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REPORTS OF CASES

ADJUDGED

IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN DECEMBER, 1850.

BY

ALEXANDER GRANT, ESQUIRE,

BARRISTER-AT-LAW.

SECOND EDITION.

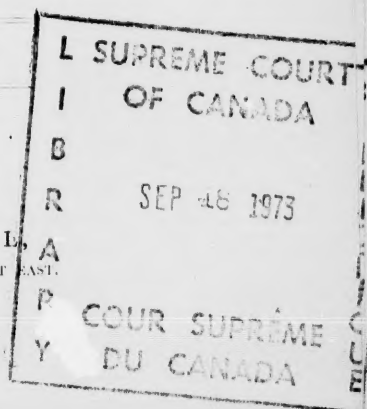
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1877.



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THE HON. JOHN BEVERLEY ROBINSON, *Chief Justice of Upper Canada.*

" " WILLIAM HUME BLAKE, *Chancellor.*

" " JAMES BUCHANAN MACAULAY, *Chief Justice of the Court of Common Pleas.*

" " ARCHIBALD MCLEAN, *Judge of the Court of Common Pleas.*

" " WILLIAM HENRY DRAPER, *Judge of the Court of Queen's Bench.*

" " ROBERT BALDWIN SULLIVAN, *Judge of the Court of Common Pleas.*

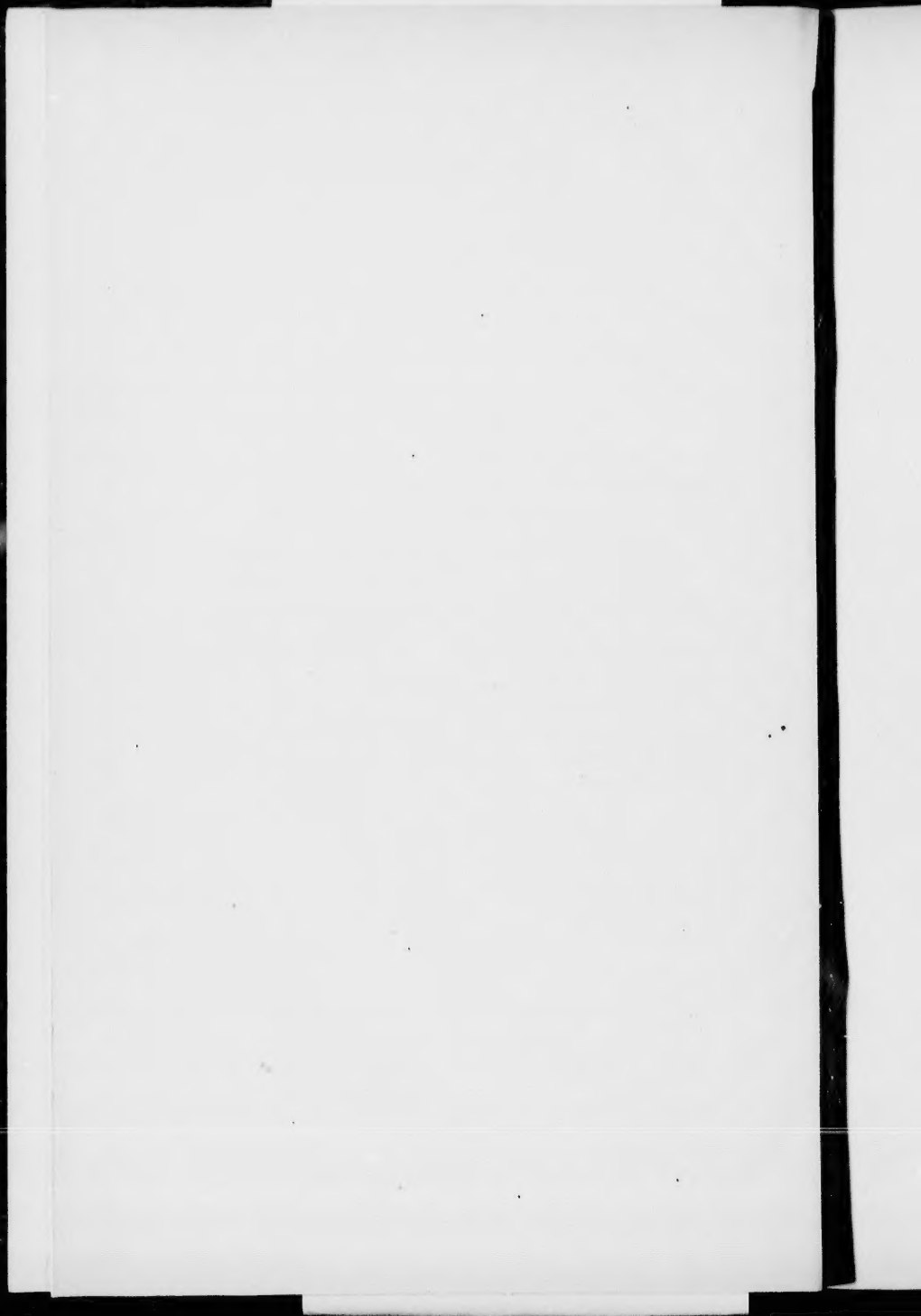
" " J. CHRISTIE PALMER ESTEN, *Vice-Chancellor.*

" " ROBERT EASTON BURNS, *Judge of the Court of Queen's Bench.*

" " J. GODFREY SPRAGGE, *Vice-Chancellor.*

" " ROBERT BALDWIN, and
" " WILLIAM B. RICHARDS, } *Attornies-General.*

JOHN SANFIELD McDONALD, ESQ., and
THE HON. JOHN ROSS, } *Solicitors-General.*



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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING IN DECEMBER, 1850.

ARTHURTON V. DALLEY.

Principal and Agent—Fraud.

1850.

Nov. 12 & 13
Dec. 6.

A person resident abroad sent funds to an agent in this country for the purpose of investing in lands; the agent bought a parcel of land for 600*l.*, and took the conveyance in his own name, which property the agent asserted to his principal he had paid 1000*l.* for, and made a conveyance to his principal and charged him that sum in account; some years afterwards the principal discovered the true nature of the transaction, and filed a bill in this court for relief. The court decreed him entitled to the land at the sum of 600*l.* and directed a reference to the master to take an account of the dealings between the principal and agent.

The bill in this case was filed by *John Fraser* Statement.
Arthurton, of the Island of Nevis, in the West Indies, Esquire, against *Henry Dalley*, *William Dalley* his father, and his brother *Edwin Dalley*; and as amended stated, that the plaintiff having confidence in *Henry Dalley*, had been induced by his representations to invest money in the purchase of a certain lot of land in Malahide, but which, as *Henry Dalley* had alleged, was disposed of before the funds remitted by the plaintiff reached *Dalley*, in consequence of which he, *Dalley*, had effected the purchase of another lot in the same township, (being lot number two, in the second concession), and had paid 1000*l.* therefor, instead of which the bill stated that 350*l.* was paid

1850. in cash out of the plaintiff's funds, and 250*l.* by a promissory note, which note was paid by plaintiff remitting funds for that purpose, making in all the sum of 600*l.*, and which the plaintiff alleged was more than the property was worth, while at same time *Henry Dalley* retained of plaintiff's funds the sum of 1000*l.* as having been paid for the land: the bill further stated, that *Dalley*, acting as agent of plaintiff, had purchased or pretended to purchase two town lots in a village called Davenport for 50*l.* and which lots *Dalley* pretended had become forfeited to the vendor, by reason of default having been made in erecting buildings thereon, according to the contract, although during the whole of this period *Dalley* had funds of the plaintiff for the purpose of building. The bill charged that *Dalley* was the owner of the lots so pretended to have been purchased by him for plaintiff; that they were one-fifth of an acre each, and portions of a lot of 200 acres in Malahide, on Lake Erie, which was worth about 4*l.* per acre.

Statement]

That plaintiff had remitted several sums to *Dalley*, amounting in all to 1332*l.* and upwards, out of which, in addition to the sum of 1000*l.* and 50*l.*, alleged by *Dalley* to have been paid for these lands, he claimed the sum 5*l.* or 6*l.* as having been expended by him as agent of plaintiff, leaving, according to his own shewing, a balance of nearly 300*l.* remaining in his hands; that the deed for the 200 acres had been taken and registered in *Dalley's* name, and that he still retained possession and remained in receipt of the rents and profits thereof. The bill further alleged, that *Dalley* had expended other sums of money belonging to the plaintiff in the purchase of other lands in the township of Malahide, and upon which *Edwin Dalley* resided, being lots numbers two and three in the third concession, which lands *Henry Dalley* pretended he had purchased as agent for and

with the funds of the defendant *William Dalley*, and 1850.
 which it was alleged he had conveyed to *William Dalley* without consideration, with a view of preventing plaintiff asserting any claim thereto, and charged notice of all the facts and circumstances on the part of *William Dalley*.

*Arthurton v.
Dalley.*

The bill prayed an account of moneys received by *Henry Dalley* as agent of plaintiff and of lands purchased by *Henry Dalley* or any one for him, with such moneys, and that he might be declared a trustee thereof for plaintiff, and he decreed to convey to plaintiff free of incumbrance, &c.; and if on taking such account it should appear that any portion of plaintiff's moneys had, jointly with others, been invested in lands, then that plaintiff might be declared entitled to a lien on the lands so purchased, and an account of rents and profits; that the sale of the two village lots might be declared void and plaintiff entitled to the money pretended to have been paid; that the conveyance to *William Dalley* might be declared void as against the plaintiff; and for further relief.

Statement.

The defendant *Henry Dalley*, by his answers to the original and amended bills, stated that he had purchased lot number two, in the second concession, from *Joel Davis*, for 600*l.* in March, 1835, a year before receiving funds from plaintiff, and set out in a schedule a statement of his account, shewing a balance in favour of the plaintiff of about 76*l.*

The defendant *William Dalley* claimed the lands conveyed to him, as having been purchased for him by his son with funds furnished by *Wm. Dalley* for that purpose.

The depositions taken in the cause shewed that *Henry Dalley* had mortgaged and otherwise dealt with the property, afterwards conveyed to his father,

1850. as his own; that *Wm. Dalley* had himself always spoken of it as being his son's property, and that no mention was ever made of it as belonging to *Wm. Dalley* until after *Henry* had become embarrassed and in difficulties. And all the witnesses with the exception of *Edwin Dalley*, stated that the conveyance from *Davis* to *Henry Dalley* was made in the spring of 1836, and not in the fall of 1835. One witness, *William Huggins*, swore that *Henry Dalley* had told him that he purchased the property from *Davis* for the plaintiff; that he had contracted for it six months before actual conveyance. He also swore that *H. Dalley* paid *Davis* 350*l.* in June, 1836, when deed executed; and that *Dalley* had executed, and left with witness, a deed of this lot in favour of plaintiff.

Statement.

A great deal of evidence was gone into, but it is considered that this, together with the statement of the facts set forth in the judgment, will be sufficient fully to understand the points decided.

On the cause coming on for hearing, Mr. *Turner* and Mr. *C. W. Cooper*, for the plaintiff, contended that there could be no question as to plaintiff's right to the relief sought; the whole tendency of the evidence is to establish a system of the grossest frauds by the defendant *Henry Dalley*, and many statements in the answers are sufficient to create a very strong suspicion of the *bona fides* of the conduct of all the defendants.

Argument.

No doubt a contract between a principal and his agent may be valid, but in every such case it must be clearly established that the principal had the fullest notice that he was dealing with the other, not as his agent, but as an adverse party; here, on the contrary, all the statements made by *Henry Dalley* tended plainly to lead the plaintiff to believe that *Dalley* was acting throughout as his friend and agent.

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such circumstances, it was clear, they submitted, that 1850.
 plaintiff was entitled either to adopt the purchase at
 the sum actually paid, or to repudiate it altogether, ^{Arthurton v. Dalley.}
 and insist on repayment of his money; and if any
 doubt existed as to the lands conveyed to *W. Dalley*
 having been bought by *Henry Dalley* with the funds
 of the plaintiff, then the proper course to take would
 be a reference to the master to enquire as to this
 point. Amongst the cases cited by them were *East*
India Company v. Henckman (a); *Massey v. Davis* (b);
Cole v. Gibson (c); *Abingdon v. Butler* (d); *Cole v.*
Gibbons (e); *Kennedy v. Lee* (f).

Mr. R. Cooper for *Henry Dalley*.

Mr. J. Crickmore for *William and Edwin Dalley*.

For *Henry Dalley* it was contented, that plaintiff ^{Argument.}
 had acquiesced in and confirmed the contract, if even
 all the statements made as to the manner of his
 obtaining the land were true, while if the version
 given by *Dalley* of the time and manner of purchasing
 the property were correct, it was clear that no relief
 could be afforded.

For *William and Edwin Dalley* it was insisted that
 the lands owned by *William* had been purchased with
 his funds, and that neither of them had any connection
 whatever with the acts said to have been committed
 by *Henry Dalley*, and that as against them the bill
 ought to be dismissed with costs.

THE CHANCELLOR.—Although the pleadings and <sup>Dec. 6.
Judgment.</sup>
 evidence in this cause are very voluminous, the ques-
 tion seems to me to be a very plain and short one—
 the facts are sufficiently established, and the princi-
 ples applicable to those facts obvious.

(a) 1 Ves. jr. 237. (b) 2 Ves. jr. 317. (c) 1 Ves. 507. (d) 3 B. C. C. 119. (e) 3
 P. W. 293. (f) 3 Mer. 441.

1850. Towards the close of the year 1835, the plaintiff, a gentleman resident in the island of Nevis, applied to *Henry Dalley*, one of the present defendants, to act as his agent in the purchase of lands, in the township of Malahide, where the defendant then lived. The plaintiff appears never to have been in this province, either before or since the period mentioned. The plaintiff was an entire stranger to the defendant; but through the medium of a common friend, Mr. *Seabrooke*, he seems to have imbibed a very favourable opinion of Mr. *Dalley's* integrity; and his letters of January and November shewed that he reposed in him implicit confidence. The defendant having acceded to the plaintiff's proposal, considerable sums of money were remitted to him, and the transactions occurred which are the subject of the present investigation.

Judgment.

The bill embraces three distinct objects. The first relates to a parcel of land in the township of Malahide, lot number two in the second concession; in relation to which the bill alleges that the defendant having purchased it for 600*l.*, as the plaintiff's agent, and paid for it from the plaintiff's funds, fraudulently represented the price to have been 1000*l.*; and asks that the defendant be ordered to convey at the actual price, and to refund the residue. The bill, secondly, impeaches the sale of two small parcels of land in the town of Davenport, as sales of the agent's own property, brought about by gross misrepresentations, and prays that those sales may be wholly set aside. And the plaintiff represents lastly, that his moneys have been expended by his agent in the purchase or improvement of other lands in Malahide; he asks an account, and that he may be declared to have a lien upon the lands so purchased or improved by means of his funds.

Confining our attention for the present to the first transaction: the defendant admits that the tract of

land in question was purchased by him, as alleged by the plaintiff, for 600*l.*; but then he affirms that it was so purchased before he became the agent of the plaintiff; that in the interim between his purchase and the subsequent sale, about fifteen months, various improvements were made, by which the value of the property was greatly increased; and lastly, that the contract was entered into by him with a single eye to the plaintiff's interest, and upon terms advantageous to him.

1850.

Arthurton v.
Dalley.

It was a matter of surprise to me, I confess, to hear it argued that this sale could be supported upon the evidence before us, even assuming the truth of those allegations of the defendant to which I have referred. Upon that hypothesis, the reasonableness or unreasonableness of the price charged would not have been the question for determination, because, as a general proposition, the law avoids contracts of this kind without enquiring whether the contract has or has not been advantageous to the principal, and without considering whether the evidence is or is not sufficient to make out a case of actual fraud against the agent; laying down a broad rule, based upon principles of reason, of morality, and of public policy. How, in reason, can such contracts be valid? A contract affecting the rights of parties is necessarily based upon a concurrence of intention. Now, as the author of the treatise on equity has expressed it, consent is an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on either side. But if the agent, who ought to weigh the terms of the contract on behalf of his principal, and whose assent, under such circumstances, would be the assent of the principal, if he, instead of weighing terms proposed by another, with a view to the interest of his principal, and giving thereto a deliberate reasoning consent, becomes the very party to propose adverse terms, how is a contract any longer

udgment.

1850.
 Arthurton v.
 Dalley.

Judgment.

possible? (a) Again, how is it possible to permit such contracts to stand consistently with the relationship subsisting between the parties? The principal who entrusts the conduct of his business to an agent, contracts for the benefit of his unbiased judgment in the conduct of such business. He has a right to the benefit of his advice respecting the matters committed to his care, and an unreserved communication of the circumstances by which this may be affected; but how can this duty be performed, if he who is intrusted with the business of others can be allowed to make such business an object of interest to himself? (b) And is not the rule based on the soundest principle of public policy, which, having reference to the frailty of humanity, the difficulty if not impossibility of serving two masters, and considering the utter inability of any court, however constituted, to unravel the frauds likely to grow out of such a course of dealing, wholly prohibits contracts attended with such consequences?

If such be the principles by which this court is guided in relation to contracts of this class generally, argument would be superfluous to evince the necessity of their strict application to the present case. But it was contended, that the plaintiff had so long acquiesced in this contract as to have disentitled himself from coming here now for its rescission; and although the answer does not distinctly set up that case, yet it is so framed, I think, as to enable the defendant to avail himself of the defence, if borne out by the evidence. Unquestionably such contracts may be confirmed, or they may be acquiesced in so long as to disentitle the principal from coming here for relief. But, is not knowledge of the circumstances involved in the very term acquiescence? Can the principal be said to confirm the contract so long as he remains ignorant of all that renders such con-

(a) Woodhouse v. Meredith, 1 J. & W. 204. (b) York Building Co. v. Mackenzie, 8 B. P. C. 63.

firmation necessary? And does not the onus of proof necessarily rest upon him who asserts the validity of such a contract? (a) Now, turning to the earliest information furnished to the plaintiff by the defendant respecting the contract, so far as we are informed, it is abundantly evident, I think, that it not only did not disclose the truth, but was carefully framed to mislead. The letter is dated the 22nd of April, 1836, and contains the following passage:—

“However untoward the delay was to you in not immediately answering my letter, still there is balm in Gilead; and as your intentions were fixed on mill property, which certainly you could not better invest money for accumulation in, being certain of soon doubling in value, we have chosen a spot equal, if not superior to the other; it is the next mill property up the stream, has all the water of the other, an easy outlet to the lake, and nearer the pine-woods, and lastly, which doubles it in value, two sites for mills of immense power on it, instead of as there only one; consists of 200 acres of land, 30 acres well cleared, 20 partly, the best frame barn in the township, two log-houses, a young orchard, and some buildings, besides; the river crosses it twice. Between and about the centre of the land stands the house on a very commanding and picturesque spot, possessing a view of all the romantic scenery, of the meanderings of the river down the luxuriant vallies, and, as soon as a few more acres of woodland is cleared, will in the distance have a full view of the Lake Erie and the rising town of Davenport. The whole of the land is excellent, and the flats equal to any in the world, well watered everywhere; though the river of course crossing it twice makes it more unlevel, and at the same time more valuable, though the country people are not convinced of its superiority over flat lands;

1850.
Arthur v.
Dalley.

Judgment.

(a) Gillett v. Peppercorne, 3 Beav. 78; Brookman v. Rothschild, 3 Sim. 158.

1850. however, the property is truly unequalled—the price is \$4000, and soon will be worth \$8000.”

*Arthurton v.
Dalley.*

Judgment.

There are other passages in the letter to which I shall have occasion to refer before I conclude. They weigh, however, still more heavily against the defendant; they are indeed irreconcilable with his case. But, confining my attention for the moment to the passage just cited, it may be safely asserted, I think, that it conveys not even a hint to the plaintiff (himself ignorant of every fact upon which to form a judgment respecting the proposed purchase) that the person by whose disinterested and unbiassed judgment he proposed to be guided, had disabled himself from discharging the duty he had assumed, by the acquisition of an interest directly adverse to that of his employer. It certainly conveys no intimation that this agent, in his attempt to hold in an even balance his own interests and those of his principal, had charged for this estate almost twice the amount he had but just paid for it, even upon his present statement. Assuming such a combination of circumstances as would justify the court in pronouncing this to have been confirmed, or so long acquiesced in as to preclude relief to be possible; yet assuredly it requires neither reasoning nor authority to evince, that any such confirmation or acquiescence, with respect to a contract so objectionable in its inception and accompanied with so much suppression of truth, as well as actual misrepresentation, must have been preceded by the fullest disclosure of all the circumstances affecting the contract, and the fullest opportunity of forming a correct opinion thereon. But the utmost that can be said of the defendant's evidence is, that some of his subsequent letters convey obscure hints that he himself had been the vendor. That information even is very obscurely conveyed; and the very special circumstances connected with the contract were never communicated.

It is said, however, that this sale was effected through the intervention of an independent party, Mr. *Huggins*, who is represented as the plaintiff's agent. It is hardly possible to treat such a statement as seriously advanced. The evidence distinctly shews that the plaintiff had not confidence in Mr. *Huggins*. He entrusted his business to the defendant, an entire stranger, because he felt that he could not trust *Huggins*. But though that difficulty were obviated, it is not shewn that *Huggins* was ever called on to exercise a judgment upon this sale. The contrary is quite apparent, from the established facts; and, in his evidence, *Huggins* emphatically declares that he never was consulted on the matter; and I believe that to be the truth.

1850.
Arthurton v.
Dalley.

I have made the foregoing observations rather in deference to the arguments addressed to us, than from any feeling of their necessity to the decision of this case; for, in my opinion, the only conclusion that can be arrived at, upon this evidence, is, that the defendant purchased this property as the agent of the plaintiff, and paid for it with the plaintiff's money; and the consequence cannot, I presume, be doubted that the agent's contract, with all its advantages belongs to the principal. But in deference to that argument, it seemed proper to point to the principles by which the court would have been guided, upon the assumption that the facts had been established upon which the argument was based.

Judgment.

In support of the assertion, that *Henry Dalley* had purchased this property long prior to the sale to the plaintiff, the learned counsel for the defendant relied, first, upon certain articles of agreement between *Davis*, the former proprietor, and his client, dated the 5th of March 1835; and secondly, upon the indenture of bargain and sale from *Davis* to him, which bears date the 5th of October 1835. The account given

1850. of the transaction in the defendant's answer is,
Arthurton v
Dalley. that he purchased the property in March 1835, when
 he paid the sum of 350*l.* in cash, and gave his promissory note for the balance.

It will not be necessary to examine minutely the grounds upon which I am compelled to withhold my belief from the statement so made by the defendant, because there is one piece of evidence which seems to me conclusive. But before I proceed to that particular portion of the testimony, I must briefly advert to the circumstances of suspicion connected with the evidence upon which the defendant seeks to establish his statements, and to the opposing testimony, which seems to me all but conclusive.

Judgment. First, as to the articles of March, 1835, the terms are peculiar; it stipulates (without any explanation) for the continuance of the vendor's possession until June, 1837. The stipulations were not complied with, if the defendant's testimony be true, for the money was not paid, confessedly, when the deed was executed, but in June, 1836; neither was the plaintiff's promissory note then given. The instrument is in the handwriting of *Henry Dalley*; there is no subscribing witness; and that the name *Joel Davis* is the handwriting of the vendor, is by no means satisfactorily proved—judging merely from comparison, it would not seem genuine.

Then as to the indenture, the word 'five' (all important as to the question now before us) is written upon an erasure. That is not explained. One of the subscribing witnesses, it is true, swears that this instrument was executed in the autumn of the year 1835. That witness is a brother of the defendant, was much mixed up in some of his transactions, and he points to no circumstance by which his attention was so fixed upon the time of the execution of this

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deed, as to enable us to rely confidently upon the accuracy of his memory. Opposed to the testimony of this subscribing witness, as to the date of the execution of the deed, bearing upon the face of it an erasure unexplained, we have the testimony of Mrs. *Davis*, wife of the grantor, who swears that the sale was made between March and May, in the year 1836. The same fact is corroborated by the brother-in-law of *Davis*, who states circumstances in confirmation of his testimony, about which he is little likely to be in error. The deeds itself shows that Mrs. *Davis* barred her dower only on the 6th of June 1836, and she swears that that circumstance was contemporaneous, or nearly so, with the execution of the deed. Lastly, she produces articles of agreement between *Davis* and *Henry Dalley*, respecting this very farm, dated the 2nd of June 1836. It is true that the instrument is not executed, but it is in the handwriting of *Dalley*, and amongst other stipulations contains one respecting the note given on the 1st of May 1836, for the balance of the purchase money. How is this to be reconciled with the defendant's case? If the farm were really sold and paid for in March 1835, what mean the articles of June 1836? But what appears to me conclusive against the defendant, as I before mentioned, is his own letter of April 1836. In writing to the plaintiff, at a time when this contract was in progress, he says—"In the fall, 20 acres of wheat must be put in on the farm, and let to some person, as it will be free for you then, *the contract gives him liberty to hold it to get his crops off*. We must pay interest for the money, not enough here, as a note will be given for the residue on interest, and a deed secured to you as soon as it arrives, and regularly recorded in the registry office here in your name, when you shall have a copy sent you." How is this letter to be reconciled with the defendant's answer. "The contract gives *him* liberty to hold it to get his crops off." What contract? Assuredly not that between the

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Arthurton v.
Dalley.

Judgment.

1850.
 Arthurton v.
 Dalley.

Judgment.

plaintiff and defendant, but that between the defendant and *Davis*, which is in accordance with the unsigned articles produced by Mrs. *Davis*. Again, "we must pay interest for the money, not enough here, as a note will be given for the residue on interest." Can this be construed to mean that the writer was to receive and the plaintiff to pay interest? And what note would have remained to be given for the residue, had the statement in the defendant's answer been true? Or what interest would the plaintiff have had in a note to be given by the defendant upon a purchase in which the defendant only had an interest? Assuming the farm to have been purchased and the note for the residue given in March 1835, as the defendant's answer represents, the whole letter is unintelligible; but if the unsigned articles in the defendant's hand-writing represent actually existing facts and not mere figments of Mr. *Dalley's* imagination, and if the evidence of Mrs. *Davis* and others is to be relied upon, the whole admits of easy explanation—the contract had not been concluded at the date of that letter, and the note there spoken of was in fact given on the 1st of May following.

Upon this branch of the case, therefore, I cannot view this letter in any other light than as a statement that this property was purchased by the defendant as the agent of the plaintiff and on his behalf; and the defendant having made such a representation to one about to deal on the faith of it, I am of opinion that we should disregard the settled principles of this court were we to permit him now to controvert its truth. Irrespective of that letter, I am also of opinion that the same conclusion very clearly follows from the other evidence, and that the attempt to retain the 400*l.* in question is a very gross fraud on the part of the defendant. Rude and barbarous countries afford little scope for practices of this class; but as advancing civilization gives value to property, and leads to the

accumulation of wealth, it has been always found to bring along with it these attendant evils, because amid the varied dealings of a civilized people, the frailty of humanity is necessarily subject to such temptation as nothing short of the fullest development of the moral principles of our nature has been found sufficient to resist. From these common evils we cannot hope to escape. Indeed we would seem, in relation to this sort of contract at least, more exposed to them than others; for in countries more densely peopled, where transactions of this sort necessarily become more widely known, and the value of property is better ascertained, such a fraud as that attempted by the defendant would be impossible. But it is the peculiar duty of this Court to protect the community against transactions of this kind; and it would be a reproach to the administration of justice here were it doubtful, that, under the circumstances of this case, the plaintiff must be decreed entitled to the benefit of the contract between *Davis* and the defendant, and to an account and payment of the moneys improperly retained (*a*).

1850.
Arthurton v.
Dailey.

Judgment.

With respect to the second transaction complained of by this bill, the plaintiff is also, in my opinion, upon the evidence as it now stands, entitled to relief. It is certainly less objectionable than the former. The plaintiff was from the first informed that the property offered for sale was the property of his agent; and, admitting that a valid contract might be made under such circumstances, it is plain, upon reason and authority, that the utmost good faith would be exacted from an agent so selling under ordinary circumstances. But this is not an ordinary case. The confidence reposed in the defendant was implicit. The plaintiff was not only unacquainted with the locality, but, from his residence in a distant colony, deprived of the means of acquiring information, ex-

(a) *Lee v. Tunstall*, 1 R. & M. 53; *Taylor v. Salmon*, 4 M. & C. 134.

1850. *Arthurton v. Dalley.* cept through the defendant. Under such circumstances, a sale suggested by an agent, at a price very disproportionate, upon information altogether fabulous, as it would seem, cannot be supported; but the evidence upon this point is so unsatisfactory that it will be proper to direct an inquiry if desired.

As to the last transaction, quite enough has been shown, in my opinion, to make it proper that it should be referred to the Master, to enquire whether any and what sums belonging to the plaintiff have been expended in the purchase or improvement of lands in the township of Malahide.

Judgment. ESTEN, V. C.—Three points present themselves for consideration in this case—namely, the claim with respect to the lot number two in the second concession of Malahide; that relating to the Davenport lots; and that respecting the 400*l.* As to the last point, I think enough appears to justify inquiry. The answer of *William Dalley* denies that any part of this money was applied in the improvement of lots two and three in the first concession; but the answer of *Henry Dalley* admits that it, or part of it, may have been so applied; and as he had the money in his hands, and new more about its application than *William Dalley*, it is plain that further inquiry is requisite and proper on this point. As to the lot number two in the second concession, I think the plaintiff entitled to relief on various grounds. I think it plain, from the evidence, that *Henry Dalley* purchased this lot on behalf of the plaintiff at 600*l.*, and therefore must account for the balance of the 1000*l.* which was charged for it; but if the case be otherwise, it is certain that he sold the lot to himself, as the plaintiff's agent; and although he used some expressions in his letters which pointed to a sale from himself, he never brought the fact fully and fairly under the notice of the plaintiff, with an expla-

nation of all the circumstances, failing which no 1856
confirmation can be asserted which is binding on the plaintiff. No authority is shown on the part of *Huggins*, whose intervention seems to have been procured and lent in order to give a colour to the transaction. Under such circumstances, I understand that the principal is entitled to annul the sale as a matter of course, and which cannot be resisted. But supposing the objection arising from the agent filling the inconsistent characters of buyer and seller to be waived, it is clear that he made his principal pay much more than and nearly double the value of the land, and for this reason the sale could not be sustained. It is immaterial whether the acts in question were performed by *Henry Dalley*, on his own account, or as agent for his father. If the sale should be set aside, the defendant would become a debtor for the amount of the purchase money to the plaintiff, who would have a lien for it on the land. I think an inquiry should be directed into the circumstances attending the sale of the Davenport lots, which do not at present clearly appear. I think *Henry Dalley* should pay costs up to the decree, and that the consideration of future costs and further directions be reserved.

Declare that *Henry Dalley* purchased the land in the pleadings mentioned (being lot number two in the second concession of the township of Malahide) as the agent of the plaintiff, at and for the price or sum of 600*l.*, and that plaintiff is entitled to a conveyance thereof.

Declare the sale of the two village lots in the village of Davenport void, and that plaintiff is entitled to the amounts charged therefor, together with interest.

Refer it to the Master to take an account of the moneys received by *Henry Dalley*, from or on account of the plaintiff, and of the rents and profits of said lot number two in the second concession of Malahide, received by the said *Henry Dalley*, or which, &c. Also to take an account of all moneys paid by the said *Henry Dalley* to plaintiff, or expended for him or on his account; and if amount less than receipts, then *H. D.* to pay difference to plaintiff; but if more, then plaintiff to pay *H. D.* the amount of the excess.

Also refer it to the Master to enquire what, if any, sums of money belonging to plaintiff have been expended in the purchase or improvement of any other lands in Malahide, or elsewhere, belonging to the defendants, or any or either of them; and if it shall appear that any of

1850. the moneys of plaintiff have been so expended, then declare plaintiff to have a lien for the amount on the lands, and, unless paid, direct a sale; and if land insufficient to realize the amount so expended and plaintiff's costs, then order *H. D.* to pay the deficiency.

Arthurton v.
Dalley.

Minute.

Order and direct that *H. D.* do convey the said lot number two in the second concession of Malahide, to plaintiff, or to whom, &c., free, &c.

Reserve further directions and costs of defendants, *William Dalley* and *Edwin Dalley*.

1850.

Nov. 19, &
Dec. 3.

PRENTISS v. BRENNAN.

Practice—Receiver—Partnership.

Where in consequence of the misconduct of a managing partner a receiver had been appointed, a motion called on a person in possession of property of the partnership, the legal estate in which property was in such partner, to deliver up possession or attorn to the receiver, was granted, though the person in possession swore that the conveyance by which such legal estate became vested, though absolute in form, was executed by the deponent as a security only.

Statement.

This was a motion on the part of the plaintiff, upon notice, that *James Cornelius Gardner* might be ordered to deliver up to *William Ireland*, the receiver appointed in this cause, within such time after service upon the said *J. C. G.* of the order to be made upon the said motion as the said Court should think reasonable, the possession of the following property; that is to say—the south-east quarter of farm lot No. 19. in the 1st concession of the township of Kingston, (except the village lots conveyed to divers persons prior to the 14th day of August, 1874,) and village lot No. 1, on the east side of Main-street, in the village of Portsmouth—village lots forming part of the north east quarter of the said farm lot formerly owned by, &c. &c.; village lot No. 12 on the east side of Main-street, and water lot and pier in front thereof; together with the possession of all houses, out-houses and other buildings, erected on the said parcels or tracts of land or the appurtenances thereof, standing and being; or that the said *J. C. G.* might be ordered, within four days after service upon him of the order to be made on this motion, to attorn to the receiver, for and in respect of the said respective premises, or such of them as the said *J. C. G.* should appear to

be *bona fide* tenant of; and might be ordered, within such time as the court should appoint, to deliver up to the receiver the possession of the residue of the said premises, and to pay to the said receiver the arrears due by *Gardner* for rent, in respect of the said premises; and that on default in obeying the order of the court in respect of the said matters *J. C. G.* should stand committed.

1850.

Prentiss

V.
Brennan.

It appeared from searches made at the registry office, and set forth in the affidavits filed in support of the motion, that the title to the property, the subject of the present motion, was in the defendant. Part of it had been mortgaged to him by *Gardner*, in May and August, 1847, to secure specific sums, and further advances in goods, or otherwise; and *Gardner* had afterwards, and in the same year, released to the defendant his equity of redemption in the mortgaged property. The rest of the property in question appeared to have been about the same time acquired by the defendant, from third persons. Of all this property *Gardner* was in possession at the time of being served with the notice of motion. To shew the property, as between the plaintiff and defendant, to be partnership property, the plaintiff read the affidavits and other evidence which had been read in support of a former motion, and the substance of which is stated by the Chancellor in his judgment, ante vol. 1, page 488; together with several other affidavits. From the latter, in addition to the particulars above set forth, it appeared that the defendant, before this suit was commenced, had intimated to the plaintiff, in a proposal for settlement he made to the latter, that *Gardner* had owed the firm a debt of 1250*l.*, and that in payment of such amount he had some time previously conveyed to the defendant the property in question. The answer of the defendant to the plaintiff's bill also contained this passage—
“ And this defendant denies it to be true that he hath

Statement.

1850. devoted to land speculations on his own account (including the property purchased by this defendant of *James Cornelius Gardner*, in the said bill referred to, and the premises the residence of this defendant and his family, and which defendant submits and insists are his own private and individual property, and not the property of the said firm) any portion of the means of the said company, or means in any way derived therefrom, to which this defendant was not entitled under the articles."

Prentiss
v.
Brennan.

It further appeared that the Receiver had several times called on *Gardner* to attorn to him; the first time verbally, and the second and third times by written notice. On the first occasion, which was on the 30th of July last, *Gardner* replied that he had leases from the defendant of the whole property. One of these he exhibited; the other he refused to permit the receiver to read. He said also that he had paid the rent reserved by those leases. The second demand was made on the 18th of October following, and *Gardner* then replied to the effect that he would become a tenant and pay rent, when his property was paid for: that he did not know how much he had still to receive, or how much *Brennan* had paid him on account of the land, as *Brennan* had never rendered him any account, but that he had not been paid the value. On all three occasions he refused to attorn. Some circumstances were also mentioned which it was urged were evidence of collusion with the defendant.

Statement.

Against this application *Gardner* filed one affidavit, his own, to which he annexed the two leases above referred to. The affidavit admitted one of the mortgages; insisted that the second had been given to *Brennan*, as trustee for another person, one *Morrell*, "to secure a debt alleged to be due by defendant's late father to *Morrell*." And of the third mortgage the

affidavit said nothing. The release, *Gardner* swore, was executed by persuasion of the defendant, while *Gardner* was somewhat in difficulty, and upon the defendant's assurance that it would only operate as a mortgage to secure past and future advances made to *Gardner*, and for the purpose of paying two judgments obtained against him by other persons; and that it was in fact the same as a mortgage for that purpose.

1850.

Prentiss
v.
Brennan.

Gardner further swore, that ever since the execution of such release it had been treated as a security only; that the property was worth 1500*l.* or 2000*l.*, and stated that he was willing to attorn if he could do so without prejudice to his equity in the premises.

The leases under which *Gardner* claimed to hold were dated the 13th day of May, 1850; one for a term of one year, the other for seven months, at a rent of 37*l.* 10*s.* and 20*l.* respectively; and together these leases embraced all the property the subject of the motion, except the village lot No. 1, and those mentioned in the notice as formerly owned by other parties; and were sent to *Gardner*, as he alleged in his affidavit, by *Brennan* from Oswego, after the commencement of the suit, and after having been frequently urged by *Gardner* to come to a settlement; and not feeling satisfied with his position, he went to Oswego and urged the defendant to come to some terms, and to give him (*Gardner*) some documents which would show the real nature of his interest in the premises, but which *Brennan* refused to do, although he acknowledged that he had an equitable interest in the premises.

The defendant filed no affidavit on the present motion.

Mr. *Mowat*, for the plaintiff, cited *Empringham v.* Argument

1850. *Shortt, (a) and Reid v Middleton (b)*, and relied on them as warranting the present motion being granted.

Prentiss
v
Brennan.
Argument.

Mr. *Turner* for defendant.

Mr. *C. W. Cooper* and Mr. *R. Cooper*, for *Gardner*, submitted that he was in the position of a mortgagor in possession, and that under such circumstances the Court would not order him either to give up possession or attorn.

Judgment.

THE CHANCELLOR.—The determination of this motion, does not appear to us to involve, necessarily, any consideration of the merits, as between *Gardner* and the defendants; and, under such circumstances, it is desirable, and with a view to *Gardner's* interest proper, that we should refrain from expressing any opinion upon matters which may come before us on a future occasion in a fuller state of development.

As between the plaintiff and the defendant, it is not to be denied that a very considerable debt, amounting to above 1250*l.* was at one time due from *Gardner* to the partnership. This was asserted by *Brennan* at a time when no reason for misrepresentation would seem to have existed, and the release of *Gardner's* debt formed part of the proposition which immediately preceded the suit. If, therefore, *Brennan* is to be regarded as a mortgagee merely, as *Gardner* would represent, still it is not denied that *Gardner* is in default, and that a considerable sum is due upon the security. *Gardner* has no right to the continued possession of the property against the will of the mortgagee; and the plaintiff would, under the circumstances of this case, be entitled to be placed in the receipt of the rents and profits through the medium of the receiver.

On the other hand assuming *Brennan* to be, as he

(a) 3 Hare, 47*c.*

(b) 1 T. & R. 155.

represents himself, the actual owner of this estate, 1850.
 we have before determined—that, upon the evidence
 before us, coupled with the spoliation of which the
 defendant has been guilty, this property is to be
 regarded, in equity, as belonging to the partnership,
 so far at least as to entitle the plaintiff to have the
 receiver put into possession. In either view, there-
 fore, without determining against the title set up by
Gardner upon the argument, based either upon the
 discrepancy between the case now stated by him and
 his former solemn deeds, or upon the inconsistent
 course pursued and statements made by him, subse-
 quent to the institution of this suit, and without con- Judgment,
 sidering whether *Gardner's* equity to have these
 transactions set aside as fraudulent—the proper sub-
 ject of a bill on his behalf seeking that relief—could
 have furnished a valid answer to this application;
 without entering upon those topics, we think that
Gardner has shown no title to the present possession
 of this property.

But, apart from any consideration of the proper
 legal conclusion, *Gardner* himself can scarcely be
 said to resist the motion, he submits by his affidavit,
 either to attorn or to give up possession.

Under all the circumstances, the proper order will
 be to refer it to the Master to fix an occupation rent,
 at which *Gardner* may continue in possession, if he
 so desire it. The leases executed by *Brennan*, after
 the institution of this suit, do not strengthen *Gard-
 ner's* title, upon the plain ground that he himself
 treats them as colorable; and, for the same reason,
 they afford no criterion of the real value of this prop-
 erty. Should *Gardner* decline to become the occu-
 pier upon these terms, then, we think, that he must
 be ordered to deliver possession to the receiver.

1850.

Nov. 8, &
Dec. 3.
Fuller
v.
Richmond.

FULLER V. RICHMOND.

Injunction—Specific performance—Practice—Pro confesso.

The plaintiff contracted with two of the defendants for the manufacture by them of five thousand saw-logs, to be delivered at the mouth of the River Trent, for which he was to pay partly by instalments during the progress of the work and the residue when the logs should be delivered at the place designated, and at the same time or immediately afterwards it was verbally arranged that the logs, as they were manufactured, should be marked with the plaintiff's initials and should be delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the mouth of the river. The stipulated advances were duly made, and the logs as manufactured were marked with the plaintiff's initials, but not otherwise delivered to him. *Held*, that the manufacturers could not afterwards dispose of these logs to the prejudice of the plaintiff; and, having attempted to do so, by selling and delivering them to a third person for value, but who had notice of the plaintiff's claim, an injunction was granted to prevent their removal by such person.

Where one of several defendants makes default in answering, and the plaintiff has obtained an order to set down the bill to be taken *pro confesso* as against that defendant, the cause must be heard against all the defendants at the same time.

Statement.

In this case an injunction had been granted *ex parte* restraining "the defendant from selling, transferring or removing the logs in the bill mentioned from the boom at the mouth of the River Trent;" and the plaintiff now moved, upon notice, that the injunction so granted should be extended "to restrain the defendants and each and every of them, their, each and every of their agents, servants and workmen, from meddling or interfering with the logs in the bill filed in this cause mentioned, or any of them, and from preventing the plaintiff, his agents, servants and workmen, or any of them, in the removal or transportation of the same logs or any of them from the River Trent to Alexandria, in the said bill mentioned, or from taking possession of the same or any of them and dealing with and using the same as his own."

The bill in this cause was filed by *John W. Fuller*, of Alexandria, in Jefferson County, in the State of New York, against *Cyrus C. Richmond*, *William Carl* and *George W. Redmond*, and set forth that on the 24th day of November, 1849, an agreement had been entered into between the plaintiff and the defendants *Richmond* and *Carl*, which was partly reduced into

writing, and the writing was to the effect that *Richmond* and *Carl*, in consideration of the sum of 1000*l.* to be paid to them in parts or parcels as therein mentioned, by the plaintiff, did thereby promise bargain, agree and undertake to make and manufacture 5000 saw-logs for plaintiff of certain specified dimensions; and *Richmond* and *Carl*, in consideration of the advances and payments therein mentioned, to be well and faithfully made to them or either of them or plaintiff, did further promise and agree to deliver or have ready for delivery to plaintiff on or before the 10th day of June 1850, at the mouth of the River Trent, in said river, one-half of said logs to be manufactured as aforesaid, and the remainder thereof to be delivered to plaintiff or ready for delivery on or before the 1st day of August following, in like manner; and *Richmond* and *Carl* further promised and agreed to make and provide a sufficient boom of square white pine timber, of certain specified dimensions and well secured, for the purpose of towing the said logs to Alexandria Bay, on the American side of the River Saint Lawrence.

1850.
Fuller
v.
Richmond.

Statement.

And *Fuller*, in consideration of such undertaking of *Richmond* and *Carl*, and in contemplation of the faithful performance of the contract on their part, did promise and agree to advance, for the purpose of aiding in the performance of the contract, to *Richmond* and *Carl* or either of them the sum of 50*l.* on the 1st day of December, the sum of 100*l.* on the 15th day of January next ensuing the date of the said contract, and in addition thereto the sum of 75*l.* on the 13th of each month during the progress of the contract; and *Fuller* further agreed to pay *Richmond* and *Carl* at the rate of four shillings Halifax currency for each and every standard log so to be delivered on the days and time aforesaid, or when the same should be ready for delivery as aforesaid, as by the memorandum of agreement when produced would appear.

1850.
 Fuller
 v.
 Richmond.

The bill stated that it was *at the same time* verbally agreed between plaintiff and *Richmond* and *Carl* that the said logs, when and as they were manufactured, should be marked with the initials of plaintiff and should as manufactured be delivered to plaintiff, as a security to him for the advances made and to be made on account of the said contract.

It also appeared that the logs were afterwards duly manufactured and marked with the initials of the plaintiff, some of them by one *Craig*, acting as the agent of the plaintiff, and the rest by the men employed by *Richmond* and *Carl*, and that all the advances were duly made, and about 400 of the logs were actually delivered to plaintiff.

When the rest of the logs were conveyed near to the mouth of the River Trent, *Richmond* and *Carl*, having become indebted to the other defendant, *Redmond*, sold and delivered the said logs to him.

The prayer of the bill was for a specific performance of the contract by *Richmond* and *Carl* and an injunction.

The statements of the bill were verified by the affidavits of two persons, *Craig* and Mr. *James Robertson*, who had prepared the written agreement. Several affidavits were filed in opposition to the motion.

The account *Carl* gave of the parol agreement was, that at the time of entering into the written agreement *Craig*, as agent of plaintiff, proposed to procure a larger marking hammer than any in use upon the river, so that the mark might not be covered or obliterated by any other mark, and that he (*Carl*) told *Craig* he might do so; but that such permission was given only for the purpose of *identifying said logs*,

and not to effect a delivery of the same or of any part thereof. *Richmond*, in his affidavit, did not deny or refer in any way to the parol agreement.

1850.
Fuller
v.
Richmond

It appeared that the defendant *Redmond*, when he bought, knew that the plaintiff made some claim to the logs, and in the affidavit filed by him he swore, "that prior to and at the time of the said sale, to deponent the said *Richmond* and *Carl* assured deponent that the said plaintiff had no lien or security upon or right to the said logs or any of them, and that he had no notice whatever of any such right prior to such sale."

Mr. Mowat and Mr. Turner for the plaintiff.

Mr. Vankoughnet and Mr. Strong, for *Redmond*.

Argument

Mr. R. Cooper for *Richmond* and *Carl*.

For the plaintiff, it was contended that this was a case where any damages that would be obtained from a jury would not be a sufficient compensation for the loss sustained by him from being unable, as set forth in the bill, to carry on his business; and wherever that is the case equity will decree specific performance of the contract, a breach of which is about to committed; and even without reference to this class of cases, the court will grant an injunction, —*Langton v. Horton* (a); *Buxton v. Lister* (b); *Adderley v. Dixon* (c); *Withy v. Cottle* (d); *Duncuft v. Albrecht* (e) *Show v. Fisher* (f); *Monkhouse v. Hay* (g); *Newlands v. Paynter* (h).

The marking of the logs with the initials of the plaintiff was an act sufficient to change the property

(a) 4 Hare 509. (b) 3 Atk. 384. (c) 1 S. & S. 607. (d) 1 S. & S. 174. (e) 12 Sim. 189. (f) 12 Jurist, 152, S. C. 2 De G. & S. 11. (g) 3 Price, 209. (h) 4 M. & C. 408.

1850.
Fuller
v.
Richmond.

in them; this was clearly decided by the Court of Queen's Bench in the case of *Dunning v. Gordon* (a); for although in that case the facts are not distinctly stated in the report, still it is evident from what does appear, that an actual delivery could not have taken place; for if it had, then no such question as arose in that case could have arisen; therefore it was submitted that the mere fact of marking the logs must have operated as a delivery sufficient to change the property.—*Hodgson v. Le Bret* (b); *Buines v. Jevons* (c). *Mucklow v. Mangles* (d) may be cited by the other side to show that what took place here did not vest any property. In that case it was held that the builder of a vessel having painted the name on the ship was not sufficient to change the property; however, that case has been doubted.—*Curruthers v. Payne* (e) *Clark v. Spence* (f) is a strong authority in favor of the view taken by the plaintiff; *Battersby v. Gale* (g) is also a strong case in his favor. There a ship, the subject of the contract, was partly built, and some instalments of the price paid, and both the counsel and Court appear to have treated it as settled, that the ship belonged to the purchaser; the only question argued being whether the assignee of the builder who had become bankrupt, had any claim for the excess of the value of the ship, so far as it was built, over the amount which had been paid. *Wood v. Rowelliffe* (h); *Doloret v. Rothschild* (i); *Story on Contracts* sec. 810, were also cited.

Argument.

For the defendant *Redmond*.

The counsel for the plaintiff insist that an actual delivery of these logs has taken place; if so, then the plaintiff is out of Court and an action of trover is the proper course for him to take in order to ob-

^a (a) 4 U. C. Q. B. 399. (b) 1 Camp. 233. (c) 7 C. & P. 288. (d) 1 Taunt. 318. (e) 5 Bing. 276. (f) 4 A. & E. 469. (g) 4 A. & E. 458. note b. (h) 3 Hare, 304. (i) 1 S. & S. 590.

tain relief. The case of *Langton v. Horton*, relied so strongly on by the plaintiff, it is submitted is no authority in this case. There, the assignment was of the future earnings of a vessel, such an assignment was invalid at law, and the only place, therefore, in which *Langton* could obtain the relief sought, was in a court of equity, and in giving judgment the *Vice-Chancellor* based his decision expressly on that ground.

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[*Per Cur.*—They say that their legal title is complete for some purposes, and is such as entitles them to come to this Court, to prevent their agent from dealing illegally with their property.]

As to the agency, a question arises whether the merely marking the logs with the initials of the plaintiff would operate as a delivery, it may have been that *Richmond* and *Carl*, when getting out these logs, had intended them for the plaintiff, but having afterwards changed their minds on this point, they had a perfect right to dispose of the logs to any persons desirous of purchasing. And even supposing it clear that they acted as agents of plaintiff, *Redmond* is not bound, unless it be shewn that he was aware of the fiduciary character which they filled.

As to the argument that *Fuller* is in extensive business, and that the loss of these logs will be a serious damage to him; the same argument might be made use of in almost every case of a contract to deliver any chattel, or even a promise to pay a sum of money by a particular day. Saw logs, it was submitted, were not entitled to any greater consideration by the Court, and no difference existed as to the rules that should govern the Court in deciding a question respecting this species of property, any more than if the subject in litigation were a horse, or any other chattel.

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 v.
 Richmond.

The plaintiff does not pretend that these logs have any peculiar value, so as to entitle him to come for the interposition of this Court.

[THE CHANCELLOR.—Suppose this had been a contract for the delivery of a certain quantity of railroad iron at Quebec at the close of the navigation, and that accordingly a consignment was made, but on the arrival of the vessel at the port of Quebec it became known that the vendor was about to sell and deliver the iron to a third party, would not that be a case in which the vendee would have a right to apply to a court of equity to restrain such improper dealing ?]

Argument.

It probably would, if it could be shewn that no other iron such as had been contracted for could be obtained ; but here, for all that appears, the plaintiff can obtain the same description and number of logs from other parties ; and no pretence is set up that they are of any peculiar value. If they had been sawn up into lumber, it would have become impossible to perform the contract which had been entered into ; and if the court should order *Redmond* to deliver up these logs, he must buy others—this the plaintiff can do as well as *Redmond*.

It was also contended that the effect of the delivery to *Craig*, even if it took place, gave plaintiff a lien for his advances and nothing more, leaving in *Richmond* and *Carl* the right of disposing of the property subject thereto. *Atkinson v. Bell* (a), *Clark v. Bulwer* (b), *Logan v. Le Mesurier*, (c), and *The Law Magazine*, vol. 12,334, were cited.

The Counsel for *Richmond* and *Carl* took the same objections as had been taken on behalf of *Redmond*.

Judgment.

THE CHANCELLOR.—It will be unnecessary for us to pronounce any order upon the present motion,

(a) 8 B. & C. 277 ; (b) 11 M. & W. 243 ; (c) 12 Jurist, 1091.

because it was very properly arranged between the parties that the plaintiff should be permitted to remove the saw-logs which form the subject of this suit, upon giving security, in case the Court should be of opinion that the original injunction was properly granted.

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v.
Richmond.

In discussing the propriety of the injunction order, made on the *ex parte* application of the plaintiff, several important questions were suggested by the learned counsel for the plaintiff, in anticipation of the arguments which he supposed would be urged against the order. Some of those questions were not discussed because the learned counsel for the defendants conceded them, and argued his case upon the assumption, that, either the contract of these parties, or their subsequent dealings, had the effect of transferring the property in the logs in question to the plaintiff. He contended that the arguments adduced on the part of the plaintiff for the purpose of establishing that the property had vested in him, (which were not impugned), were destructive of his equity, inasmuch as they evinced that an action of trover, and not a bill in equity was his proper remedy; and he argued very forcibly that, as a general rule, a bill in equity will not lie for the specific performance of a contract relating to chattels, or for the delivery of specific chattels, some speciality in the nature of the contract being essentially requisite to sustain the former, and some peculiarity in the nature of the chattel rendering the action of trover an imperfect remedy, being necessary to found the jurisdiction in the latter, and the *Pusey Horn* case and others of that class were cited.

Judgment

Viewing this case in the light in which it was presented by the learned counsel for the defendant, I have no difficulty in deciding that this injunction was properly granted. In that respect it seems to me clear that the plaintiff has a right to come here,

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for the purpose of restraining his agent from the wrongful disposition of that which, upon the hypothesis, is confessedly the plaintiff's property, without reference to the nature of that property; because I am of opinion that the right to be protected in the enjoyment of personal property, *in specie*, is not, either in reason, or upon authority, confined to cases where the property in respect to which the jurisdiction is invoked is of peculiar value (a); but that (to borrow the language of *Lord Cottenham*) "where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power."

ndgment.

Acting upon the doctrine so explicitly stated in *Wood v. Rowecliffe*, which seems to me sustained by decided cases, and calculated to promote the ends of justice, (especially in this province, and with regard to this particular sort of contract), it is obviously unnecessary to pronounce any opinion upon the question made on the argument of this motion, as to the jurisdiction of this Court to decree the specific performance of a contract respecting chattels; because, whatever may be the proper conclusion upon that subject, the plaintiff has, in my opinion, a right to come here for an injunction upon the principle just stated: but, lest I should seem to raise doubts where none appear to me to exist, it is proper to add, subject to any change of opinion which future argument may produce, that modern authority, in my opinion, tends to extend rather than restrict the doctrine established in *Buxton v. Lister* (b), and the other cases of that class.

(a) *Wood v. Rouscliffe*, 3 Hare, 304; 6 Hare, 183. (b) 3 Atk. 383.

The other questions—namely, whether the property in these logs had vested in the plaintiff, or whether, if not so vested, an equitable charge had not been created in his favour, were not discussed. The learned counsel for the defendant rather assumed, as I have said, that the property had so vested. Under these circumstances, I have not thought it necessary, in disposing of this motion, to pronounce any decided opinion upon several propositions advanced by the learned counsel for the plaintiff, because I am satisfied that the present case, if not governed by former decisions, comes so near some of them as to make it our duty to preserve this property *in medio*, until that question shall have been finally settled (*a*).

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Richmond.

I do not accede to the argument advanced on the part of the plaintiff, that the Statute of Frauds does not apply to contracts of this character. For although that would seem to have been so decided in *Groves v. Buck* (*b*), yet that case was subsequently questioned, and seems to have been overruled by *Smith v. Surman* (*c*), which very much resembles the present; and if the Statute of Frauds would (apart from the consideration to which I shall presently advert) apply, it would seem that such a written contract could not, at law at least, be varied in any respect by a parol agreement. That was so determined, with respect to the 4th section of the stat. in *Goss v. Lord Nugent* (*d*). The same principle was subsequently applied to a contract falling within the 17th sec. in *Steed v. Dawber* (*e*), and seems to have been further extended in the subsequent case of *Marshall v. Lynn* (*f*). But, assuming that there is nothing in the nature of this contract to prevent the application of this statute, and that such a written contract, unless excepted out of the statute, cannot be varied by an independent parol agreement,

(*a*) *Newland v. Paynter*, 4 M. & C. 413. (*b*) 3 M. & S. 178. (*c*) 9 B. & C. 340.
(*d*) 5 B. & Ad. 58; see also *Stowell v. Robinson*, 3 B. U. C. 928. (*e*) 10 A. & E. 57.
(*f*) 6 M. & W. 189.

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has not this case been taken out of the statute by means of the partial payments which are shewn to have been made? (a). A note in writing is required to the validity of a contract falling within the 17th section, if the case be not brought within the specified exceptions; but, being brought within those exceptions, is not the contract to be regarded, for the present purpose, as unaffected by the statute? And is it not capable of being varied by a subsequent parol agreement, to the same extent as an ordinary written agreement?

Judgment.

Again, are the principles upon which evidence of a subsequent parol contract was rejected, in the cases to which I have referred, applicable at all to such a parol agreement as is relied on here? The property in these logs, it may be assumed, would not have passed, irrespective of arrangement, until the delivery at the mouth of the Trent. But would it not have been competent to the parties to have subsequently agreed to the delivery of the logs, and the transfer of the property at an earlier period? And if a delivery, either actual or symbolical, were made, for the purpose of so vesting the property in the vendee, must not evidence of the intention or agreement of the parties, upon which such delivery was had, have been admissible?

Assuming this contract, then, to be excepted out of the Statute of Frauds, on one or other of the grounds to which I have referred, and that it is to be regarded as a written contract unaffected by that statute, no doubt can exist, I presume, that such a contract may be varied (if this be a variation) by a subsequent parol agreement. In delivering the judgment of the court in *Goss v. Lord Nugent* (b), Lord Denman observed—"But after the agreement has been reduced to writing, it is competent to the parties, at any time

(a) Walker v. Messey, 10 M. & W. 302. (b) 5 B. Ad. 65.

before breach of it, by a new contract not in writing, either altogether to wave, dissolve or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." And the judgment of the same noble Lord in *Steel v. Dawber* (a), is to the like purport.

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Richmond.

Then, looking at the evidence adduced, what is its effect? That the logs were marked with the plaintiff's initials is not denied; and, in my opinion, the proper conclusion to be drawn from the affidavits before us is, that they were so marked in pursuance of an agreement between the parties, that, as manufactured, they should become the property of the plaintiff, in order to his security for the large advances Judgment. he was bound to make under the original contract of sale. This agreement is distinctly stated in the bill, and verified by the affidavits filed on the part of the plaintiff; and the qualified denial on the part of the defendants, so far from shaking my confidence in the plaintiff's statement, tends rather to confirm my belief in their general truth. The manual delivery is denied. That was not asserted. But the agreement that the logs, as manufactured, should become the plaintiff's property in order to his security, and the marking, in pursuance of that arrangement, has not been satisfactorily denied. Now had those terms been incorporated in the written contract, would not the property in the logs, as marked, have vested in the plaintiff? In delivering judgment in *Logan v. LeMesurier* (b), a case in some respects analogous to the present, Lord Brougham observed—"To constitute a sale, which shall immediately pass the pro-

(a) 10 A. & E. 57. (b) Jurist, 1091.

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 Richmond.

Judgment

perty, it is necessary that the thing sold should be ascertained in the first instance, and that there should be a price ascertained or ascertainable; but the parties may buy and sell a given thing, nothing remaining to be done for ascertaining it, but the price to be afterwards ascertained in a manner fixed by the contract of sale or upon a *quantum valebat*; or they may agree that the sale shall be complete, and the property pass in the specific thing, although the delivery of possession is postponed, and although something shall remain to be done by the seller before delivery, or they may agree that nothing remaining to be done for ascertaining the thing sold, yet that the sale shall not be complete, and the property shall not pass before something is done to ascertain the amount of the price. The question must always be—what was the intention of the parties in that respect? And that is of course to be collected from the terms of the contract. If those terms do not shew an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing be done." And in *Clarke v. Spence* (a), upon a contract to build a ship, the price to be paid by instalments at certain specified stages of the work, the court determined (in deference to a dictum of *Lord Tenderden* upon a similar contract) that an intention to vest in the purchaser, for his security, the property in an incomplete chattel, upon payment of the specified instalments, was to be collected from the contract, and they held the property to have vested accordingly, although the agreement contained no express provision to that effect, and although they considered such construction unnatural. The observation of Mr. *Justice Wightman*, in delivering the judgment of the court, has a material bearing upon the case now before us. He observed—"It is not so made by the contract in question in express

(a) 4 A. & E. 470; see also *Dunning v. Gordon*, 4 U. C. Rep. 400.

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terms, neither was it in the case of *Wood v. Russell* (a), but we apprehend that the passage above cited from the judgment in that case, is founded on the notion that provision for the payment, regulated by particular stages of the work, is made in the contract, with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser. If this notion be correct, the payment is no doubt material to the vesting of the property, and the effect of such payment is, that there is not only an appropriation of so much of the vessel as is then constructed, but also a vesting of the general property in so much in the purchaser, subject to the right of the builder to retain it, in order to complete it and earn the rest of the price. The right of the parties will then be in the same state as if so much of the vessel as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished; and it will follow that every plank and article subsequently added will, as added, become the property of the purchaser, as general owner."

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Richmond.

Judgment.

To apply the principle of those cases to the present: if the property in these saw-logs, as manufactured and marked, would have vested in the purchaser, upon payment of the specified instalments, in case the original contract had contained such a stipulation and if evidence of the agreement to that effect actually made, be receivable, must it not follow that these logs are to be regarded as remaining in the hands of the defendants, as the plaintiff's agents, for the purpose of completing the contract? And has not the plaintiff a right to restrain such agent from the wrongful disposition of his property upon the principle laid down in *Wood v. Rowcliffe*?

(a) B. & Ald. 942.

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Richmond

But, laying out of view the effect of this contract at law, without determining whether the language ascribed to *Lord Tenderden* in *House v. Bull* (a) must not be qualified to some extent, and without enquiring the effect which would be given to this contract at law upon the principles laid down in *Lunn v. Thornton* (b), is it not true, that property in a chattel having no existence at the date of the contract, may be transferred in equity? (c) Is it not true that the title of a purchaser for value, under such a contract, is recognised in this Court? Has a party, having purchased with notice of such a contract, any defence to a bill like the present?

Under all the circumstances, I am of opinion that the plaintiff has established such a case as to make it proper that this injunction should be continued to the hearing.

Judgment. ESTEN, V. C.—The plaintiff had contracted with the defendants *Richmond* and *Carl*, for the manufacture of 5,000 logs of pine wood, for the supply of his saw-mill at Alexandria, for which he was to pay the sum of 1,000*l.*, partly by certain instalments at certain specified times during the progress of the work, and the remainder at the final delivery of the logs at the mouth of the River Trent, whither they were to be conveyed by the defendants *Richmond* and *Carl*, and where, after having been attached to a boom, with a view to their transportation to Alexandria Bay, they were to be delivered to the plaintiff.

The foregoing agreement was evidenced by a writing under the respective hands of the parties.

It appears to have been originally intended that *Richmond* and *Carl*, who were persons of no means, should furnish security for the due completion of the contract,

(a) 7 B. & C. 482. (b) 1 C. B. 380. (c) *Langton v. Thornton*, 1 Hare, 549; *Newlands v. Paynter*, 4 M. & C. 408; *Lyde v. Mynn*, 1 M. & K. 688.

but difficulties having presented themselves to the execution of this plan, it was, at the time of the execution of the agreement, or rather perhaps immediately afterwards, arranged that the logs, as they were manufactured, should be marked with the initials of the plaintiff, and should be delivered to the plaintiff as security for his advances, without prejudice however to the agreement under which they were to be conveyed to the mouth of the river by the defendants *Richmond and Carl*.

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Richmond.

The advances stipulated for were duly made by the plaintiff, who was even in advance to the defendants *Richmond and Carl*, and the logs, as they were manufactured, were marked with the initials of the plaintiff, but were not otherwise delivered to him, and were, when their number was completed removed by the defendants *Richmond and Carl*, with a view to their conveyance to the mouth of the river, and were on their way thither, and at the distance of 17 miles from the spot, when the defendants *Richmond and Carl* sold and delivered them to the other defendant *Redmond*, in consideration of 600*l.* which was composed of advances made by *Redmond* to *Richmond and Carl*, in the shape of supplies during the progress of the work, and some debts contracted by them in connection with the work, and assumed by him.

Judgment.

The plaintiff, under these circumstances, applied for an injunction to restrain *Redmond* from disposing of the logs, or from preventing the plaintiff from removing them to Alexandria Bay. An injunction was granted to restrain *Redmond* from disposing of the logs; and the present application is to extend that injunction, so as to permit and authorize the removal of the logs from the River Trent. As the continuance of the logs in the river was not only useless, but injurious, it was very properly arranged at the argument, that if the Court should be of opinion that the injunction which had been already obtained was properly granted, the logs

1850. might be removed by the plaintiff, on condition of
 Fuller his furnishing security to the amount of the consider-
 V. ation paid by *Redmond* for his assignment.
 Richmond.

Judgment.

The case presented several points of great interest, and, amongst others, the doctrine of hypothecation and the extent to which it is permitted by the law of England, were incidently discussed. It seems clear that hypothecation, as recognized and practised under the civil law is not allowed under the law of England—at all events, as that law is administered in courts of common law—on account of the dangers and mischiefs which would arise if the owner of chattels, to which the mere possession constitutes a *prima facie* title, were permitted to create a lien on them in favour of another person, while he retained the possession of them himself and appeared to the world as their real owner. We cannot, however, fail to perceive how seriously this principle is infringed by the recognized power of creating a lien on chattels by an instrument under seal, to the perfection of which possession is not required, when the absence of it is consistent with the terms of the contract.

An instrument under seal is never required by courts of equity for the perfection of any title which claims its cognizance—the existence of a valuable consideration is the only circumstance which it regards as essential; and it is difficult to understand how an agreement by parol—that in consideration of advances to be made for the manufacture of goods, such goods when manufactured should become subjects to a lien in favor of the person making the advances, as a security for such advances, although they were to remain in the possession of the manufacturer, in order that something remaining to be performed might be completed by him—should not be as effectual in equity, if not at law, as an assignment under seal by way of security of existing

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chattels, which are thereafter to remain in the possession of the assignor, confessedly is both at law and in equity. The supposition that this sort of hypothecation would be deemed valid in equity, if not at law, derives additional strength from the consideration that it would be attended, as practised in equity, with none of the dangers which would exist at law; for if goods, with respect to which such a lien existed, should be purchased by a third person for valuable consideration, without notice, he would probably, in accordance with the privileges which usually govern courts of equity in such matters, be allowed to hold his purchase; while if he had notice of the lien at the time that he purchased, he could not complain if it should be enforced against him. It is unnecessary however to express any opinion on this point; and it will only be necessary to observe, that it has been decided in the case of *Langton v. Horton*, that an assignment of goods not in existence at the time, but the existence of which was only contemplated, for valuable consideration, although admittedly void at law, will be upheld in equity; and although in this case the assignee acquired possession of the goods as soon as they were within his reach—and much stress was laid on that circumstance by the very learned judge who decided the cause—it is difficult to understand how, without such possession, the assignment should not have had its effect against the assignor himself, and all persons, such as the judgment-creditor in that case, who stood in the place of the assignor, and all persons, in fact, who had not a right to say that they were injured or defrauded by such non-assumption of possession.

Judgment

It is necessary, before I proceed further, to advert to the situation of *Redmond*, and the nature of his title to the goods in question in this case. It is clear, I think, and indeed the contrary is not pretended, that his title accrued first on the 9th of August, when the sale and

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v.
Richmond

Judgment.

delivery to him took place, and when all the logs had been manufactured and marked in the manner which has been described I think, moreover, that he clearly had notice of the whole of the plaintiff's title. Independently of the evidence upon this point, his own denial of notice is, I think, sufficient to shew that he had it. He says that he was assured by the defendants *Richmond* and *Carl*, before the sale to himself, that the plaintiff had no lien, security or interest in the logs. This shows that he had heard enough to induce him to make inquiry, and he should have inquired of the right person, in which case he would have learned the whole truth. I am of opinion, upon the authority of the case of *Clarke v. Spence* (a) that under the agreement, which has been mentioned to have been made between the plaintiff and defendants *Richmond* and *Carl*, at the time of, or immediately after the execution of the written agreement, a legal property in these logs vested in the plaintiff as they were manufactured, and marked with his initials for the purpose of giving effect to the security, for which he had stipulated by the agreement in question. This was admitted by the learned counsel for the defendants, in the course of his argument; and I think he took the right view of the matter. He went on indeed to contend that, as the plaintiff had acquired the legal property, his remedy was at law; but there I am compelled to differ from the learned counsel. When *Richmond* and *Carl* remained in possession after the property had passed to the plaintiff, they so remained in possession as his agents—that is, in a fiduciary capacity. Had they afterwards withheld the possession of these goods from the plaintiff, they would have been decreed to deliver them up to him specifically, and they would have been restrained from making any disposition of them to the prejudice of the plaintiff's rights. This appears clearly from the case of *Wood v. Rowcliffe*,

(a) 4 Ad. & Ellis, 469.

reported in its different stages at 3 & 6 *Hare*, and 2 1850.
Phillips. A doubt arose there whether the alleged ^{Fuller}
agent was really an agent only, or had a title to the ^{v.}
property in dispute; and also whether, supposing her ^{Richmond.}
to be an agent, the plaintiff, her principal, had not
acted in such a way, that her disposition of the pro-
perty had conferred a valid legal title on the purcha-
ser, the defendant *Rowcliffe*, and therefore the mat-
ter was put in a channel of legal investigation: but
subject to these questions, it is clear that it was con-
sidered that the principal was entitled to a specific
delivery and an injunction as against his agent, and
any person claiming under her through an abuse of
her power.

The sale and delivery by the defendants, *Rich-
mond* and *Carl*, to *Redmond*, was undoubtedly an
abuse of their power and breach of their trust as
agents; it could confer no legal title on *Redmond*, ^{Judgment.}
for *Richmond* and *Carl* had no title to give, and the
plaintiff had certainly not acted in any manner which
would make their disposition effectual for this pur-
pose, for he had simply entrusted his goods to his
agents, in order that they might be conveyed to the
mouth of the river; or if, as was argued by Mr.
Strong, the defendants *Richmond* and *Carl* retained
an ultimate reversionary property, subject to the plain-
tiff's lien, which they could and did transfer to *Red-
mond*, then he, having notice of the plaintiff's rights,
succeeded to all the rights and obligations of his co-
defendants, and became equally liable with them,
upon tender of the balance due under the original
agreement, to a specific delivery of the goods, and
to be enjoined in the meantime from making any
disposition of them at variance with the rights and
interests of the plaintiff. I think, therefore, that the
injunction was properly granted in this case, and,
as a necessary consequence under the arrangement
which has been entered into between the parties, the

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v.
Richmond.

Judgment.

Order.

plaintiff will be at liberty to remove the logs, upon furnishing satisfactory security to the amount of the consideration paid by the defendant *Redmond*. There should be no costs on either side. It is clear, from the foregoing reasoning, that it has become unnecessary to express any opinion as to whether this is a contract which it would be proper specifically to enforce.

The order drawn up, in pursuance of an arrangement entered into between the parties after the argument, and referred to in the judgment, directed—"that the injunction already granted in this cause be continued; and, by consent of counsel for all parties, this Court doth further order that an extended injunction as prayed do issue, upon security being given by the plaintiff to the satisfaction of the Master of this Court: first—for payment of the sum of 600*l.*, or of such less sum as the said defendants *Cyrus C. Richmond* and *William Carl* owed to the said defendant *George W. Redmond*, at the time of the alleged sale of the said logs, in the said plaintiff's bill mentioned; including in such less sum the further sums then paid, or agreed to be paid, for the purchase money of the said saw logs, in case the plaintiff shall dismiss his bill, or the same shall be dismissed by this Court: or, second—for the payment to the said defendant *Redmond* by the said plaintiff, of the amount due, or which may be found due, by the said plaintiff to the said defendants *Richmond* and *Carl*, in respect of the said matters, after making to the said plaintiff all just allowances, in case the said plaintiff shall be declared entitled to relief at the hearing of this cause. And it is hereby referred to the Master of this Court to settle and approve of the security aforesaid."

Dec. 14.

Mr. *Turner* asked for a decree *pro confesso*, as against the defendant *Carl*, in order that it might be produced at the final hearing.

[ESTEN, V. C.—Have you any direct authority to shew that this is the proper step to be taken? If you have any such, of course we must be bound by it—otherwise, we are inclined to think that the more convenient mode of proceeding would be to proceed with the hearing against all the defendants at the same time.]

Mr. *Smith*, in his book of practice (*a*), states this to be the proper step to take, but—

Per Cur.—We think the cause must be heard against all the defendants at the same time.

(*a*) Vol. 1, p. 175.

STEWART V. HORTON.

1850.

Mortgage—Conditional sale—Parol evidence—Fraud—Inadequacy of consideration. April 7 & 8.
Dec. 6.

Where a party being in close custody at the suit of another agreed to execute a conveyance to him as a security for the amount of his debt and costs, and executed an assignment accordingly in pursuance of that agreement, but the instrument, as drawn up and executed, was deemed in point of legal effect to operate as an absolute assignment of his interest in the estate, giving the assignor a right of re-purchase, and after the day of payment had elapsed this deed was set up as a bar to the parties right to redeem, parol evidence was admitted to shew the real nature of the transaction on the ground of fraud.

One of the tests by which a conditional sale is distinguished from a mortgage is the adequacy of the consideration: Where therefore it was shown that the plaintiff had conveyed an estate for less than one-fourth of its value, with a clause giving him a right of re-purchase, the conveyance was declared to be a security only.

The original bill in this cause was filed by *John Stewart* ^{Statement.} against *William Horton, Richard Stephens* and *Robert Tweedy*; *Lawrence Lawrason* having, after the institution of the suit, become the assignee of the defendant *Tweedy*, a supplemental bill was filed, for the purpose of bringing him before the Court. The transaction out of which this suit arose, was an assignment of the plaintiff's interest in a lot of land, and which was executed while the plaintiff was in gaol at the suit of one *Mitchell*, and as he alleged, really though not in form, as a security for the debt and costs, amounting to 27*l.* 15*s.*; and the bill prayed that the instrument so executed to *Mitchell* might be declared to be a mortgage, and that *Horton* and those claiming under him might be declared to have acquired the legal estate as a security merely for the sum due from plaintiff to *Mitchell*, and that plaintiff might be decreed entitled to redeem; an account of what was due thereon, and of the rents and profits, and that upon payment of the balance plaintiff might be let in to redeem, or if it should appear that *Horton* had sold to a *bona fide* purchaser without notice, then that *Horton* might be decreed to account to plaintiff for the full value of the premises, and after deducting the sum found due by plaintiff to *Mitchell* might be ordered to pay the balance to plaintiff; and further relief.

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The facts of this case are so fully stated in the judgment that any further statement of them here is rendered unnecessary.

Dr. Connor and Mr. McDonald, for the plaintiff.

Argument.

Mr. Turner for the defendants.

For the plaintiff it was contended, that if the Court should be forced to come to the conclusion that this was a sale with a right of re-purchase, the nature of which precludes any possibility of the party ever redeeming his estate after the expiration of the time limited for payment, then, it was submitted, that the inadequacy of price was so great that no Court would allow the transaction to stand; indeed, in not one of the cases in which the conveyances have been set aside upon this ground was the inadequacy so gross as in this. Here also the parties did not meet on equal terms, the plaintiff being in prison at the suit of the person with whom he was contracting.

The language of the instrument itself set out in the answer by *Horton*, shows that it was not intended to operate as an absolute conveyance (a), and although

(a) The assignment as set forth in the answer by *Horton* was as follows: "Know all men by these presents, that I, John Stewart, of &c., yeoman, hereby assign all my right, title and interest in the annexed bond or writing, obligatory to John Mitchell, with full power for him, the said George Mitchell, his heirs, &c. to ask, demand, and adopt all such proceedings as may be necessary for procuring the Patent Deed issuing for the land mentioned therein; and when procured, to cause a transfer to be made to him the said George Mitchell, his heirs and assigns forever, as I fully as might have received the same, by virtue of the annexed bond, and of the assignment thereon, *and without any equity of redemption on my part*; with this express condition, that if I shall pay or cause to be paid to the said George Mitchell, his executors, &c., the amount of a certain judgment lately by him recovered against me in the London District Court, with expenses, amounting to the sum of twenty-seven pounds and fifteen shillings, in manner following; that is to say, one-half the said amount to be paid within three months, and the remaining half within one month thereafter; the whole to bear interest from the first day of August instant. And it is further agreed that the said George Mitchell is to take in part payment of the first instalment, one yoke of working oxen, at the appraisal of any two men who will appraise them as neat stock, provided the same are delivered to him on demand. In case default shall be made in performance of these payments and conditions, then this assignment shall remain in full force, otherwise to become void and of no effect whatever.

his answer in this respect is open to severe animadversion, he having undertaken to set out the deed in *hæc verba*, after asserting that he had destroyed it, which he could only do from a copy. Now if, as the answer states, he considered the original of no use, so neither could a copy have been considered of any service; and the instrument bears internal evidence that it was not a corrected draft, for no man, lay or professional, could ever have copied such a conveyance without correcting the phraseology. *Mitchell* himself states in his evidence that the arrangement was for security (a), so that the maxim, "once a mortgage always a mortgage," applies; but if not then it is submitted that the whole transaction carries with it so much the appearance of fraud, that this Court will never permit it to stand. Amongst the authorities cited were—*Fonblanque's Equity*, 2 vols. 260-1-2; *Davis v. Thomas* (b); *Widd v. Winnell* (c); *Perry v. Meadowcroft* (d); *Sturge v. Sturge* (e); *Williams v. Owen* (f).

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Horton.

Argument.

For *Horton*, *Stephens* and *Tweedy* it was contended that the bill as against *Stephens*, ought to be dismissed with costs, as the bill states that he had conveyed to *Horton*, it was unnecessary to have made him a party to the bill, and having been made a defendant, the plaintiff must pay his costs.

If any fraud were committed in the matter of the conveyance to *Mitchell*, it is clear that *Horton* had not anything to do with it, and *Mitchell*, it was submitted, ought to have been made a party to the suit, he also relied strongly on the want of proof of the

(a) *Mitchell* in his evidence swore, that while the plaintiff was in prison he sent for him several times, and expressed a desire that he (*Mitchell*) would take an assignment of his interest in the lot of land in question in discharge of the debt of 27*l.* 15*s.* 0*d.*, which at last *Mitchell* agreed to accept in discharge of the amount: "And I also agree I with the said *Stewart* at the said time, that if he would give me a yoke of oxen in three months, and pay the balance of the said debt of 27*l.* 15*s.* 0*d.* in four months, he should have the land back again."

(b) 1 Russ. & M. 506. (c) 1 Vern. 488. (d) 4 Bev. 197. (e) 13 Jurist, 159. (f) 10 Sim. 386.

1850. assignment from *Lemon*, the locatee of the crown of the lot in question, as being sufficient to lessen the value of *Stewart's* interest, as without this proof a patent could not be obtained. This, however, as well as the other points taken by counsel, are clearly set forth in the judgment.—*Floyer v. Lavington* (a); *Sorrell v. Carpenter* (b).

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Argument. For *Laurason* it was contended that he had no notice of the transaction, except that of *lis pendens*. Had he purchased before the institution of this suit, his title would have been good. Under these circumstances, therefore, if plaintiff is allowed to redeem, he must pay costs.

Judgment. ESTEN* V. C.—The facts of this case are, that the plaintiff being indebted to one *George Mitchell* on a judgment recovered in the London District Court, in the sum of 27*l.* 15*s.* 0*d.*, was arrested and committed to jail on a *ca. sa.* issued on this judgment about the middle of July, 1843. A Mr. *Warren* of St. Thomas, had been the attorney of *George Mitchell*, in this action, but the proceedings subsequent to the judgment were conducted by the defendant *Horton*, as the agent of Mr. *Warren*. At this time the complainant had an interest, as the assignee of the nominee of the Crown, in lot No. 30, on the north side of the north branch of the Talbot Road, in the township of Southwold, in the London District. While he was in jail at the suit of *Mitchell*, he executed to him an assignment of this interest, and was immediately released and returned to the lot, where he continued to reside until he was dispossessed of it on the 27th of November, 1844, by the sheriff, on a writ of *habere facias possessionem*, issued upon a judgment obtained by default in an action of ejectment brought against the complainant for the recovery of the land

(a) 1 P. W. 268. (b) 2 P. W. 482.

* The Chancellor was concerned in the case while at the bar.

in question by the defendant *Horton*, to whom *Mitchell* had disposed of it in the month of May previous. The original nominee of the lot was one *James Lemon*, who had disposed of it to some persons of the name of *Nichol*; and these in their turn had transferred it to the complainant, who was in possession of an assignment of the lot from *Lemon* to *Nichol*, and from *Nichol* to himself. These were delivered to *G. Mitchell* upon the occasion of the assignment to him before-mentioned. No patent had as yet issued for the lot; but when *Horton* purchased it from *Mitchell*, as before-mentioned, he discovered the residence of *Lemon*, and caused him to appear before *Colonel Talbot*, the Government Agent for the disposal of Crown Lands in that part of the country, take the oath of allegiance as required by law, and obtain a certificate of the performance of the settlement-duties, and then to execute an assignment of the lot to one *Stephens*, to whom *Horton* had caused *Mitchell* to make a transfer of the lot, when he purchased it as before-mentioned; whereupon *Horton* destroyed the assignments from *Lemon* to *Nichol*, from *Nichol* to the plaintiff, from the plaintiff to *Mitchell*, and from *Mitchell* to *Stephens*. Application was then made in the name of *Stephens* for a patent, which was obtained and forwarded from the Government Office in October, 1844, at which time *Horton* had agreed with the defendant *Tweedy* for an exchange of the lot in question, for other property situated in the town of London. A conveyance was executed to *Tweedy*, who, after the commencement of the suit, disposed of the lot to the defendant *Lawra-son* for 300*l*. The suit is for redemption, the plaintiff alleging that the assignment executed by him to *Mitchell* was by way of security, while the defendants contend that it was a conditional sale, and that the money agreed to be paid for the repurchase of the property, not having been paid at the times appointed, the estate of *Mitchell* became absolute, both at law

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and in equity. The bill states that the agreement between the plaintiff and *Mitchell* was for security, and that the assignment was executed in pursuance of that agreement, but that the plaintiff is ignorant whether it was a form of mortgage or an absolute conveyance. The defendants, however, it alleges, pretend that it was an absolute conveyance. It then proceeds to state that it was obtained from the plaintiff for a grossly inadequate consideration, while he laboured under great anxiety and distress of mind, and was destitute of all legal advice, except that of *Horton* himself. The bill must be considered as presenting the case in this way—namely; that the instrument was either in form and effect a mortgage, or that having been executed under an agreement for a mortgage, it must be enforced as such; *Mitchell* having either accepted it as a security, or permitted the plaintiff to execute it with that intention, and in either case, it being a fraud in the defendants, with full knowledge of the real agreement, to insist on it as an absolute conveyance; or if the assignment should prove or be deemed a sale, that it was fraudulent and void as such, for the reasons which have been mentioned. The answer insists on the assignment as a conditional sale, and that the privilege of re-purchase not having been exercised in due time, has become forfeited, and the estate of the defendants is absolute, both at law and in equity.

There is a circumstance in the case which has not received any satisfactory explanation, and which is very difficult to be understood without one. The assignment from the plaintiff to *Mitchell* was destroyed by *Horton*, when he procured the assignment from *Lemon* to *Stephens*. It is not alleged that any copy of it was preserved, nor is it likely that it would have been deemed necessary to preserve a copy after the destruction of the original, which it is alleged by the answer was destroyed, because it was consi-

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dered useless. This assignment is however set forth in the answer in *hæc verba*, and two witnesses for the defendants—namely, *Scatcherd* and *Mitchell*—swear to the accuracy of the statement. *Scatcherd* says he read the assignment twice to the plaintiff, and saw it last in the fall of 1844. *Mitchell* says he never saw the assignment after it was executed. Supposing it to be proved that this instrument was executed in pursuance of an agreement for security, and that in equity it operated as a mortgage, its destruction by *Horton* coupled with the procurement of an absolute assignment from *Lemon*, followed by a patent, and an unconditional conveyance from *Stephens* to himself, whereby all trace of a mortgage was effectually obliterated would be an act of spoliation, which would justify the court in making every presumption against the author of it.

The evidence of *Scatcherd* and *Mitchell* as to the precise contents of the instrument must be admitted to be of the most unsatisfactory description; and under such circumstances it might be necessary to direct an issue, for the purpose of ascertaining what the instrument really contained. The conclusion, however, at which I have arrived, on the other facts of the case, renders it unnecessary to resort to this arrangement, and enables me to treat the instrument in question as having been in the form attributed to it by the answer. If it were necessary to deliver an opinion as to the legal effect of the instrument, regarded by itself, I should deem it to be a sale and conveyance, with a right of repurchase on the strict performance of certain specified acts, and therefore that the plaintiff in the event which has happened, could not claim any relief, founded upon the nature of the instrument itself. (a) It becomes necessary, therefore, to consider the other circumstances of the case, and amongst these the most material, is the

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(a) *Tasburgh v. Echlin*, 2 Br. P. C. 265, Toml. Ed.

1850. actual agreement between the parties, and in pursuance of which the assignment was executed.

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Three witnesses speak to this fact—namely, *Parke*, *Betty*, and *Geo. Mitchell*. The answer has little or no direct bearing upon this question. None of the defendants had any personal knowledge of the agreement, and although *Horton* might have heard it mentioned by the complainant, little weight can be attached to any allegation standing upon this ground. The plaintiff could not possibly be acquainted with the nice distinction between a mortgage and a conditional sale. The utmost that he was likely to have said was, that if he did not pay the amount by the appointed time, he would be deprived of the land; but if he made any statement to this effect in the presence of *Horton* or *Scatcherd*, it cannot weigh much in the determination of this question, since it is perfectly consistent with the intention not to make a conditional sale of the property, but to furnish security for the debt. Neither the answer nor the evidence of *Scatcherd* is of much weight upon this point. The question therefore turns on the evidence of *Parke* and *Betty* on the one side, and that of *Mitchell* on the other, respectively corroborated or weakened, as the case may be, by the concomitant circumstances.

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Now upon this point, it is to be observed, that the testimony of *Parke* and *Betty* is to all appearance perfectly disinterested, and that *Betty* was desired by *Mitchell* himself to accompany him to the gaol, in order to be a witness to the transaction. These witnesses both speak in a manner which seems to entitle them to credit, most decidedly to the fact that the agreement between the parties was for security merely, and that a sale never entered into the contemplation of, or was once mentioned between them. The evidence of *Mitchell* cannot be considered as given with the same freedom from bias, as that of the witnesses

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whom I have already named. He might have been a party to this suit, and he has disposed of the land in question as his absolute property, and must be under the influence of a considerable desire to represent the case in such a light as to warrant that disposition. Neither the manner nor the substance of his evidence on this point seems to challenge the same credit as that of the two witnesses on the other side. Then, when we advert to the circumstances of the case, this impression is greatly strengthened. We are entitled to test the evidence of *Mitchell* by his own representation of the transaction. From this representation it appears that the plaintiff, while in prison, desired to see him, and did see him, several times on the subject of the assignment; that on these occasions he offered him an absolute assignment of the property in satisfaction of the debt, which offers he uniformly rejected; that he afterwards consulted *Horton* several times on the subject, who advised him to accept such proffered assignment, whereupon he again visited the prison, and concluded an agreement with the plaintiff for an absolute assignment of the property in satisfaction of the debt; but before returning to *Horton* to procure him to prepare the assignment, he, of his own accord, proposed to the plaintiff to deliver oxen and pay money within a certain time, and thereby re-purchase his land—to which the plaintiff assented.

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Now, it is quite evident from this statement that *Horton* did not suggest a conditional sale of the property, but advised *Mitchell* to accept an absolute assignment of it in satisfaction of the debt, as proposed by the plaintiff, and that the conditional sale, or the purchase subject to a privilege of re-purchase, was a sudden thought of *Mitchell* himself, which occurred to him after the agreement was concluded. If then this statement is to be believed, we must suppose these two yeomen, for such they were, minutely acquainted with the nice and technical distinction

1850. between a mortgage and a conditional sale. It may be added that the account given by *Mitchell* of the transaction squares neither with the statement in the bill nor that in the answer. The bill states that security was the only thing proposed and agreed upon; the answer, that a conditional sale was the thing agreed upon; but whether it was originally proposed: or a mortgage was originally proposed, and, that being rejected, a conditional sale was substituted. the defendants were ignorant. *Mitchell*, however, says that an absolute sale in discharge of the debt was originally proposed and acceded to, and that he afterwards voluntarily proposed a conditional sale to which the plaintiff assented. Upon the whole, I see no reason to doubt that the agreement made between the plaintiff and *Mitchell* in the gaol was for security merely, and from the evidence on this part of the case these points may fairly be deduced—namely, that there was only one agreement between the plaintiff and *Mitchell*; that this agreement was made between the plaintiff and *Mitchell* personally; and *Parke* and *Betty* were present when it was made, and that neither *Horton* nor *Scatcherd* was present on that occasion; that the assignment was executed in pursuance of this agreement, and accepted in pursuance of it. The only question then is, what this agreement really was? And for the reasons I have already mentioned, I have arrived at the conclusion that it was for security merely, and not for a sale of the property, with a liberty to re-purchase it as contended by the defendants. The assignment must have been prepared therefore as a security, but with a clog on the equity of redemption, which was not understood by the plaintiff when the instrument was read to him in the gaol. The amount of the explanation given to him seems to have been, that if he did not deliver the oxen and pay the money by the times appointed the land was gone, and this it is not improbable that he really believed. That what is

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once a mortgage must always remain a mortgage, and that any restriction or fetter imposed on the equity of redemption by the same instrument which created the security is wholly void, are principles of equity too well established to need any argument or observation in their support. The following cases, however, may be mentioned on this point:—*Willet v. Winnell* (a); *Floyer v. Lavington* (b); *Mellor v. Lees* (c); *Howard v. Harris* (d); *Jennings v. Ward* (e); *Willes v. Latham* (f).

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To accept an instrument as a security, and executed as such, and then to take advantage of the form in which it was drawn up, by setting it up as a conditional sale, in the event become absolute, is a legal fraud, which admits the parol evidence, and entitles the plaintiff to relief upon the transaction as a mortgage.

If, on the other hand, *Mitchell* did not receive the instrument under the agreement, but secretly nourished in his own mind a design of having the instrument drawn up in such a manner that it could be set up as an absolute conveyance, which is the only alternative supposition that can be formed, the fraud is of a still graver character. *Horton* and *Mitchell* must be identified in the transaction, so as to make *Horton* privy to the real intention of both parties. *Horton* not only acted as the agent of *Mitchell* in the matter, but he informs us himself that the plaintiff repeated the instructions for preparing the assignment which he had previously received from *Mitchell*, and that he and *Scatcherd* were particular in explaining the nature and purport of the assignment to the plaintiff. The parol evidence is admissible on another ground. In question as to whether an instrument is to operate as a mortgage or a conditional sale, parol evidence

(a) 1 Ver. 488. (b) 1 P. W. 268. (c) 2 Atk. 494. (d) 1 Ver. 192.
(e) 2 Ver. 59. (f) 2 Ll. & Goo. 68.

1855. is always admissible, because to construe the instrument as a mortgage, and thereby to allow a redemption after the time appointed for the payment of the money, and the estate has become absolute at law, is to make an equitable implication contrary to the legal effect of the instrument, which implication may always be rebutted by parol evidence. As between *Horton* therefore and the plaintiff, the assignment in the present case must, in the view of a court of equity, be regarded as a mortgage; but the case is, I think, equally clear on another ground. Supposing the instrument in question to be a conditional sale, as contended by the defendants, the transaction was one which a court of equity could never allow to stand. A sale of this nature requires an adequate consideration to support it, as much as an absolute sale. One of the tests by which it is distinguished from a mortgage is the adequacy of the consideration; and a man who, in parting with his property, stipulates for liberty to re-purchase it, is not likely to part with it at an under value.

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Now, in the present case, the consideration that was given for this property did not exceed one-tenth of its value. An attempt has been made to shew that the title was involved in difficulties, but I think it has failed. There is no doubt that *Lemon* was the nominee of the crown; that he disposed of this property to the *Nichols*, for a valuable consideration, which was paid; that they, in their turn, disposed of it to the plaintiff for an equally valuable consideration, which was also paid; and that an undisturbed possession and enjoyment had accompanied this title for more than twenty years. Is it possible that a title like this could fail for want of a certificate of the settlement duties having been performed, and the oath of allegiance taken, and of affidavits of the execution of the assignment? There was an individual in the neighbourhood who could have disclosed all the cir-

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cumstances connected with the title, and of whom *Mitchell* could have heard from the plaintiff. This was the witness *Richard Nicholl*, who gives a clear and satisfactory detail of the facts relating to the ownership of the property, and was a subscribing witness to one of the assignments. Is a man who has another in prison, in dealing for his property, warranted in shutting his eyes, abstaining from all enquiry, and because, without inquiry, he cannot tell whether the title is good or bad, in purchasing it for almost nothing? I think not. I do not mean to say that this property was worth as much as if the patent had issued; but if we deduct half its actual value on this account, it will still appear to have been purchased for a fourth or fifth of what it was really worth. In other words, a creditor puts his debtor in gaol, and while he has him there, destitute of any other legal assistance than of his creditor's attorney, purchases his property from him for one-fifth of its value. Is it possible for a court of equity to permit a transaction of this kind to stand? I think not. It is true that nine months afterwards the creditor was glad to part with the property for as little as he had given for it, but this fact is not sufficient to rebut the legal implication of fraud, arising from the facts of the case, and resulting from considerations of public policy for the protection of the distressed. The defendant *Horton* did not purchase the property until nine months after the transaction. It is true, that when he did purchase it, he adopted a very circuitous method of procuring a title to be vested in himself, and destroyed the evidences of that which already existed, whereby all trace of the real transaction between the plaintiff and *Mitchell*, which was still open and subsisting, were obliterated: It is true also that he has treated the property as his own, and insisted upon its absolute nature in his answer. These acts can be justified only by his persuasion, which he appears from his answer to entertain, that

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the facts of the case are different from what they appear to me to be on this record: but I feel bound to say that I see no ground to suppose that he had his own advantage in view, in conducting the transaction between the plaintiff and *Mitchell*, which forms the subject of inquiry in this suit. Nine months intervened before he became interested in the property and, as appears from the evidence of *Scotchard*, he in the first instance refused to purchase it at all. His exclusion of his own name in the purchase, and the destruction of the existing, and formation of a new title to the property, are calculated to excite suspicion; at the same time the change of title may have been effected merely from a desire to remove difficulties supposed to attach to the existing title, but, however that may be, he should have refused to act in the business on behalf of *Mitchell*, without requiring the intervention of another legal adviser on the part of the plaintiff.

From the considerations which I have urged, it seems to me clear, that, as between the plaintiff and *Horton*, the relief, which is sought by this suit must be given.

The only subject of inquiry that remains, is, whether the relief, which is proper as against *Horton*, should also be extended to *Tweedy*; and I think it ought. No purchaser ever had fairer notice than *Tweedy*, as appears from his own confession in his answer, which admits that when he informed the plaintiff of his intention to purchase the lot, he was warned by him not to have anything to do with it, as it was his property. This notice would have been sufficient to have subjected *Tweedy* to the plaintiff's equity, had it been at all doubtful (a). A party cannot do more than was done by the plaintiff in this case.

(a) *Caldwell v. Machrill*, 2 Eden 347; *Parker v. Brooke*, 9 Ves. 588.

When an express warning is given, as it was here, 1850.
 the case is very distinguishable from those in which
 the equity depending upon the construction of words,
 or a legal implication from facts, to be collected
 by the purchaser himself from those sources. But
 in this case, neither the facts themselves, upon which
 the equity rests, nor the equity resulting from those
 facts, can be considered doubtful.

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Lawrason, who purchased *pendente lite*, and is
 added to the suit by supplemental bill, is before the
 court, simply to obey its decree against the other
 defendants, not to be heard in opposition to that
 decree. He has objected that *Mitchell* is not a party,
 but he cannot be heard to make that objection. The
 other defendants have examined him as a witness,
 and therefore cannot make it. I am of opinion, how-
 ever, that if made by a party competent to do so, it
 could not prevail. It is the privilege of the plaintiff
 to make all participators in a fraud parties to the
 suit, in order that they may be liable to the costs of
 it, but I do not think that defendants, in whom the
 whole interest is vested, can object that a person,
 who co-operated with them in a fraud by which
 they acquired the property, ought to be present in
 order to help them to defend it (a).

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The plaintiff must be let in to redeem, with costs,
 except as of an ordinary redemption suit, against all
 the defendants, except *Stephens*, as against whom the
 bill must be dismissed with costs. He has no inter-
 est; was confessedly a mere trustee; had nothing to
 do with the property until nine months after the trans-
 action which is the subject of inquiry in the suit;
 and acted then merely for the accommodation of
Horton without any knowledge, so far as appears, of
 the fraud that had been committed, or any intention
 of promoting its success.

(a) *Oldaker v. Lavender*, 6 Sim. 239; *Bishop of Winchester v. Paine*,
 Ves. 199; *Daly v. Kelly*, 4 Dow. 435.

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Declare that the conveyance from the plaintiff to *George Mitchell* in the pleadings mentioned, and by him assigned to the defendant *Stephens*, in trust for the defendant *Horton*, was given as a security only, for the sum of 27*l.* 1*s.* 6*d.*, with interest from the first day of August, 1843; that the defendant *Tweedy* had notice thereof at the time of the assignment from the defendant *Horton* to *Tweedy*, in the pleadings mentioned; and that the defendant *Lawrason* having purchased the interest of the said defendant *Tweedy*, subsequently to the commencement of this suit, took subject to the interest of the said plaintiff in the premises, in the pleadings mentioned.

Refer it to the master to take an account of what is due for principal and interest upon the said security from plaintiff to *George Mitchell*; also an account of the rents and profits received by the defendants, or any or either of them, for the premises in the pleadings mentioned, or which &c.; and in case the master shall find that the said defendants, or any, or either of them, have or hath been in the actual and beneficial occupation of the land and premises aforesaid, or any part thereof, then he is to set an occupation rent in respect thereof, and to enquire what crops were on the said premises when the defendant *Tweedy* took possession of the same, and to charge him with the value thereof, and in taking such account the master is to allow the said rents and profits, occupation rent, and value aforesaid to the plaintiff; and in taking the accounts aforesaid, the master is to make to the parties all just allowances; and if on taking such account as aforesaid, and the taxation of the costs as hereinafter mentioned, it shall appear that a balance is due from the plaintiff, then upon plaintiff paying to the defendant *Lawrason* what shall be found due from him as aforesaid, together with such costs as shall be found due from the plaintiff to the defendant *Lawrason*, within six months after the master shall have made his report at such time and place, &c.

Minutes.

Order that the defendant *Lawrason* do reconvey the said premises, free and clear of all incumbrances, by him made, &c., and deliver up all books, &c., together with the possession of the said premises, to the said plaintiff, or to whom, &c. In default of payment by plaintiff, bill to be dismissed with costs.

But if, on taking the said account, it shall appear that a balance is due to the plaintiff, then order that the said defendants do pay to the said plaintiff such balance, within one month after the master shall have made his report at such time, &c.; and defendant *Lawrason* to reconvey.

Order that the plaintiff's bill as against *Stephens* be dismissed with costs.

Order that the defendants *Horton* and *Tweedy*, do pay to plaintiff his costs of this suit; except such costs as would have been incurred in an ordinary redemption suit, the amount whereof is to be deducted from the plaintiff's costs.

Order also that the defendant *Lawrason* do pay to plaintiff his costs of the supplemental suit, except such costs as would have been incurred in an ordinary redemption suit, the amount whereof, less the excess as aforesaid, plaintiff is to pay to *Lawrason*.

Refer it to the master to tax the costs of all parties.

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IN APPEAL.

[*Before the Hon. the Chief Justice of the Queen's Bench, the Hon. the Chancellor, the Hon. the Chief Justice of the Common Pleas, the Hon. Mr. Justice Draper, and the Hon. Mr. Justice Burns.*]

ON AN APPEAL FROM A DECREE OF HIS HONOUR VICE-CHANCELLOR JAMESON.

HOWLAND V. STEWART.

Parol evidence—Mortgage.

Where an absolute deed of real estate had been executed, and the grantor, by his bill, alleged that the deed so executed was intended as a security only, and that it had been *verbally* agreed to execute a defeasance at some future time, but it did not appear that any *acts* of the grantee were inconsistent with the supposition that the conveyance was intended to be absolute, and not by way of security, parol evidence of the alleged agreement was held inadmissible.

June 27 & 28
and Dec. 12

Letarge v. DeTuyll, ante vol. 1, page 249, remarked upon.

This was an appeal from the decree of the Court of Chancery, made in the cause of *Stewart* plaintiff (the respondent here), and *Howlands* defendants (the appellants). The facts of the case are fully stated in the judgment.

Statement.

Mr. Read and *Mr. R. Cooper*, for the plaintiff (*Stewart*) relied upon *Letarge v. DeTuyll*, and the authorities there cited, as sufficient to sustain the decree in this case.

Mr. Gwynne and *Mr. Vankoughnet*, for the defendants (*Howlands*), distinguished this from the case of *Letarge v. DeTuyll*, in this, that here there were not any acts shown inconsistent with the fact of the deed executed being intended to operate as an absolute conveyance, and that such being the case, even admitting the truth of the statements of the plaintiff as to the promise to execute a defeasance at some subsequent period, the case came directly under the operation of the Statute of Frauds, and was one in which no relief could be granted.

Argument.

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The arguments of counsel and authorities cited, are more fully stated in the judgment of the court, which was delivered by—

BURNS, J.—From what we have disclosed upon the pleadings and evidence, we think it more than probable we have not had stated correctly or truly the whole of the transactions between the parties; for the facts do not point to any one particular state of circumstances, but afford room for speculation as to the true nature of their dealings, and the object in view of the respective parties at the time the conveyance was executed. We cannot decide the case upon a mere speculative view of what we might think it right to do between them, but must take it as the parties have made it, and see if the case presented be such that relief can be afforded, and whether, if it can, it be supported by proper legal evidence. Let us then see, what the plaintiff states and the relief he seeks.

Judgment

The bill states that the plaintiff, wishing to effect a loan of money, applied to the defendants, who agreed to make such advances to him, in addition to a debt he owed them, as would be sufficient to make a sum of 200*l.*—a part to be advanced in money and the residue by means of the promissory notes of the defendants to the plaintiff; and in June 1836 the matter was concluded. An indenture of conveyance was prepared by the direction of the defendants in pursuance of the agreement, but by mistake no proviso or agreement for the redemption of the premises on payment of the 200*l.* was contained therein, as was intended by the parties when it was determined the same should be prepared. On reading the indenture before execution the mistake was discovered, and thereupon it was agreed between the parties that the intended mortgage should be made by means of the same indenture, and that a defeasance or bond for re-conveyance should be given for the premises on

payment of the 200*l.* intended to be secured. On the faith of receiving a bond from the defendants for the re-conveyance of the premises on payment of the 200*l.*, the plaintiff executed and delivered the indenture, and it was then agreed between the parties that this bond should be prepared and executed by the defendants to the plaintiff as soon as possible. The plaintiff had leased the premises before executing the conveyance, and the tenant paid him the rent for the next year after, but during the next ensuing seven years the defendants received the rents, viz., 35*l.* a-year, with the consent of the plaintiff, towards satisfaction of the mortgage debt and interest. The plaintiff, being a layman and illiterate, did not think of the bond for some time after the execution of the conveyance, but some time ago he applied for it and the defendants refused to give it. The bill contains some other statements and charges introduced to prove the plaintiff's position, which I shall notice again, but the substance of his case is as I have stated; and upon this the relief sought is, that the defendants may be decreed to execute and deliver the bond agreed upon to be given, and that the defendants be decreed to be mortgagees of the premises.

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The defendants have met this case by stating that the plaintiff did apply to them for a loan of money, but they refused, because they required their available means in their own business. The plaintiff, however, being indebted to them, they, after some hesitation, agreed to purchase the premises at 200*l.*, and this sum was to be paid thus—the first 50*l.* by the cancellation of the debt due to them, by their becoming responsible to discharge an execution then in the hands of the sheriff against the plaintiff or furnishing the means of satisfying the same, and by paying the difference to make up the 50*l.* to the plaintiff; the remaining 150*l.* was to be paid in three payments of equal sums, at one, two and three years,

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and for these payments three several promissory notes of the defendants were given to the plaintiff. The defendants deny the conveyance was ever intended to be a mortgage or security for the loan of money, but insist upon it as an absolute sale by the plaintiff and purchase by themselves, and they deny that it was ever agreed that any defeasance or bond should be executed. The defendants state that after the indenture was executed they verbally informed the plaintiff that if he repented the bargain at any time before the first of the three promissory notes became due, they would offer no obstacle to his re-purchasing the premises, and that he should have the same at the price which they were agreeing to give.

Judgment.

From the plaintiff's statement and the defendants' denial, it will be seen the plaintiff's case rests entirely upon the parol agreement to give a bond for reconveyance of the premises on payment of 200*l.*, and the plaintiff's evidence points to such an agreement at the time when the conveyance was executed. Assuming for the present that the evidence does clearly prove that the defendants did agree to execute such a bond as stated, the question is, whether parol evidence is sufficient to establish what the plaintiff contends for; or rather, the true way to look at it is, treating the plaintiff's case as true, according to the legal effect of his statements when taken altogether, can an agreement, resting entirely in parol, to execute a bond for re-conveyance at a future period, be received to control the positive effect of the conveyance; or in other words, can the non-execution of such bond at the future period, whenever that may be, be treated as such a fraud that parol evidence of the agreement may be received to control the effect of the conveyance? We understand the plaintiff to rest his case upon the proposition, that in all cases where the question is mortgage or no mortgage, parol evidence is admissible, and that such evidence is receivable,

to shew that an agreement or defeasance was afterwards to be executed—that is, what was necessary to constitute the transaction a mortgage was agreed to be reduced to writing, and consequently equity would consider an agreement to reduce *the agreement* to writing as a matter outside the Statute of Frauds. The text writers use expressions which, when quoted or taken abstractedly from the context, would seem to give some countenance to what the plaintiff contends for. Thus, for instance, Mr. Coote, in his work upon Mortgages, says:—"Accordingly, equity will admit even parol evidence to shew the conveyance was intended by way of security only." Mr. Justice Storey says:—"So if a man should treat for a loan of money on mortgage, and the conveyance to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and after the absolute deed is executed the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance." When the cases cited by these and other writers who use similar expressions are looked at, and when the comments of the text writers are considered and compared with each other, and with other passages of the same work, it is evident the proposition, in the broad sense, contended for in this case is not sustainable, neither do the writers intend what is said should be received to such extent. The plaintiff does not pretend that any bond was prepared contemporaneously with the deed, which the party fraudulently refused to execute after obtaining the absolute conveyance. No mistake or accident is shewn to have occurred in the preparation of the deed in the first instance; for, though the plaintiff states, that by mistake the deed contained no clause for redemption, yet, for all we see, the person who prepared it made no mistake, but may have prepared it according to the instructions received. The plaintiff tells us, in his bill, he agreed to adopt the deed as prepared, and agreed to execute it as it was, and that

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1850. he delivered it upon the faith of the defendants' promise to prepare, execute and deliver a bond as soon as possible for re-conveyance, and that he never thought of the bond for some time afterwards. There is no pretence that the deed was obtained upon any other footing than that of a verbal promise to execute a bond at a future period, and the fraud consists in the defendants not performing that promise. No fraud was committed at the time of the execution of the conveyance, nor does the plaintiff pretend there was anything unfair at that time. He executed the deed, well knowing what the contents were and their effect, and did so on the defendants' promise to execute a bond at a future time. The fraud of the defendants was therefore committed when they refused to execute the bond, and the plaintiff's case is in fact an attempt to carry that back to the time of the giving of the conveyance, and to engraft upon the conveyance, for the purpose of controlling its legal effect, the subsequent fraud of the defendants, in refusing to comply with their agreement; the evidence of that agreement resting entirely in the recollection of witnesses, without any manifestation by writing in any way, or any acts of the defendants inconsistent with what the deed purports to be upon the face of it. We find no case where a court of equity has decreed the performance of such an agreement as the plaintiff states and denied by the defendant, and can nowhere discover any authority or principle which can be adduced to support such a case. In many of the old cases referred to, we must interpret the expressions used with reference to the then existing circumstances and modes of conveyance. In *Cotterell v. Purchase* (a), Lord Talbot observes, "In the northern parts it is the custom, in drawing mortgages, to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the

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(a) Cas. Tem. Talbot (Forrester), 61.

defeasance may be lost, and then the absolute conveyance is set up. I would discourage the practice as much as possible." In that case there was a release of the equity of redemption, which contained a clause that the mortgagor might have his estate again upon payment of principal, interest and costs, which raised the question, whether the transaction was a conditional purchase. *Maxwell v. Montacute* (a) is the case mostly relied on when questions similar to the present arise. In that case one of the propositions put is, that where it was agreed the mortgage should be in the old form, the one then in use and that it was agreed the mortgagor should execute an absolute conveyance and there should be a defeasance from the mortgagee, it would be decreed a mortgage. What undoubtedly was meant was not merely an agreement for a defeasance, to be executed at some future period, but one which was either prepared or in course of preparation, and the party refused to execute it; for the case itself shews that a distinction was taken where the parties came to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they wholly rely upon their parol agreement, in which case it is stated, that *unless this be executed in fact* neither party can compel the other to a specific performance; and the case where there is an agreement for reducing the same into writing, and that is prevented by the *fraud and practice* of the other party, as where instructions are given and preparations made for drawing a marriage settlement, &c., in which cases the court gives relief. The different treatises upon equity jurisprudence, as also the works upon evidence, state the same general rule to prevail in equity as at law—that parol evidence is not admissible to contradict, qualify, extend or vary written instruments, and that the interpretation of them must depend upon their own terms. As in

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Marwell v. Montacute, we take it that by what is stated in *Walker v. Walker* (a), *Young v. Peachey* (b), and *Joynes v. Statham* (c), is meant that the defeasance is to be a concurrent act with the execution of the absolute conveyance, which is prevented from being perfected by fraud. If such be not the meaning, then most certainly, as respects the reception of parol evidence, one rule would prevail in equity, while a different rule prevails at law. An absolute deed, fraudulently obtained, can have no validity in either jurisdiction—no suit can be maintained upon it at law, and in equity it is made to correspond with the agreement of the parties. In the present case, the plaintiff's assertion is in effect that, though the deed was not fraudulently obtained, yet the defendants use it for a fraudulent purpose, and his evidence attempts to prove it—that is, that the true purpose for which it was made is different from what it appears on the face of it; and this he desires to establish by shewing that it was agreed he should have at some future time a defeasance, upon payment of a certain sum. To admit that such a case is without the statute, and that a court may decree the agreement so verbally made to be carried into effect, certainly would be reasoning within a circle—that is, parol evidence may be received to prove it was agreed that at some time or other a defeasance should be executed, the non-fulfilment of which agreement is a fraud upon the party, and because it is a fraud not to fulfil the promise, therefore parol evidence may be received to prove the promise. Lord North seems to have thought there was a difference between an agreement which rested altogether in parol and where it was part of the agreement that it should be reduced to writing (d). Lord Thurlow, in *Whitchurch v. Bevis* (e), observes upon this distinction and says:—"I take that to be a single case, and to

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(a) 2 Atk. 99. (b) 2 Atk. 257. (c) 3 Atk. 387. (d) *Vide* Hollis v. Whiting or Edwards, 1 Vern. 151, 159; *Leak v. Morrice*, 2 Ch. Cas. 135. (e) 2 Bro. C. C. 565.

have been overruled. If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, I agree to it, otherwise I take Lord *North's* doctrine, 'that if it had been laid in the bill, that it was part of the agreement that it should be put into writing, it would have done,' to be a single decision and contradicted, though not expressly yet by the current of opinion." If this case be not within the meaning of the statute, it is difficult to conceive what case is. The statute intended that the superior evidence of instruments should only be relied upon to prove the solemn contract of parties; but if, because it was agreed that it should be reduced to writing, such evidence be receivable, then the inferior evidence is received, and, as has been well expressed, the result would be to introduce conjecture for fact, presumption for the highest legal authority, loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt, to introduce dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would be made to depend upon the uncertain testimony of slippery memory, and be perpetually liable to be impeached by fraudulent and corrupt practices.

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There is no doubt that in cases of accident, mistake or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat the terms of written instruments; but the plaintiff, in our opinion, misapplies in this case the effect of the cases decided on these heads. If we were to hold, that simply to prove an agreement to give a defeasance at a future time, and that the not giving it was such a fraud that equity would decree specific performance of it, we are quite sure it would be so held for the first time. We can discover no principle which applies to mortgage cases

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different from other cases, as to the reception of parol proofs, but in every case where parol evidence has been received, there has been something independent of the parol evidence to show the transaction different from what the deed expresses before the proof is let in, and then the evidence is receivable for the purpose of explaining the transaction. The whole current of authority shews this to be so, and it at once explains the grounds upon which equity acts, and proves that no conflict whatever exists between the two jurisdictions in the reception of such proof. In both courts, where the principle to be decided is the same, the reception or rejection of evidence is also the same; but in cases of accident, mistake or fraud, where the instruments are made to speak or operate differently from the intention and agreement of the parties, courts of law, having no power to alter or read instruments differently than appears upon their face, parties are driven to apply for relief to the equity courts, and there the constant language is—shew by something which does not depend upon parol evidence that there is reason to believe the instrument does not truly speak the agreement made, and then parol evidence will be received to show what relief ought to be granted. Sometimes there may be something in the language of the instrument itself, or something attached to it, which irresistibly leads the mind to believe the intention of the parties different from the legal conclusion of the instrument. Thus, in the case cited of *England v. Codrington* (a), the agreement contained these words: "In consideration that Sir Wm. Codrington has agreed to advance and pay to us, whose names are hereunder written, 2,400*l.*, on or before the 20th August next, in order to pay off and discharge such sums of money as are due from us to *Thomas Evans*, as well as to supply our other occasions;" and it was held they evinced a lending of money and security for it rather than a sale. In

(a) 1 Eden. 169.

Franklyn v. Fern (a) an endorsement on the deed of 1850. conveyance by the mortgagor was received as evidence of the intent. In *Baker v. Wind* (b) Lord *Hardwicke* says, where there had been an absolute conveyance, with a separate document shewing that upon being reimbursed what had been advanced and 50*l.* beyond that amount the party would transfer, he would not allow it to be treated as a purchase but as a security. At other times the acts of the parties are shewn to be inconsistent with the idea that the instrument is in fact what it appears to be. *Le Targe v. De Tnyll*, so much relied upon by the plaintiff's counsel, is a case of that description. The cases cited there are of various kinds of acts, tending to shew the inconsistency of the instrument operating as it speaks. In all such cases the parol evidence is received to explain that which, without it, remains a mystery, and such evidence will be received, even though the defendant swear it was intended to be an absolute conveyance. Again, if the court can extract anything from the answer of the defendant, upon which it would be difficult to reconcile the deed with the statement, that circumstance will be seized upon to fasten the parol evidence. Without there be something however beyond the mere parol evidence, courts do not act upon the evidence. In *Hardwood v. Wallis* (c) a mistake was alleged to have been made in a settlement by an attorney's clerk, the court would not allow it to be corrected by the mere testimony of the attorney himself, who had received oral instructions for the preparation of the deeds, nothing appearing in the hand-writing of the parties to shew that a mistake had been committed. In *Rogers v. Earl* (d) Sir *Thos. Clarke* says: "As to the head of mistake, I do not give a positive opinion, but I do not think this court hath relied upon parol evidence singly; it must be corroborated by other evidence, as in *Frit-*

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(a) Barnard. 30. (b) 1 Ves. 160. (c) Cited 2 Vern. 195. (d) 1 Dickens, 295.

1850. *Hard v. Quincent and Hill v. Wiggan.* "Pritchard v. Quincent is reported in Ambler, 147, and there the written instructions for the settlement were produced in evidence, but the fact of their existence had not been stated in the bill, and the case was ordered to stand over, for the purpose of amending the bill and stating the fact. I find the other case, reported by the name of *Hill v. Wiggett (a)* thus—an entry in a steward's book and a parol proof by the foreman of the jury admitted as good evidence (*b*.)

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We have been referred to some American cases, as supporting the proposition contended for by the plaintiff's counsel, as to the reception of evidence upon the question of mortgage or no mortgage.

Judgment

The decisions of Chancellor *Kent* do not by any means do so, but on the contrary, quite agree with those I have already mentioned. The case of *Marks v. Pell (c)* was a case to establish a conveyance absolute in its terms, as a mortgage, on the ground that a defeasance had been executed by the mortgagee and had been left with him, and was fraudulently destroyed. Chancellor *Kent* thus remarks:—"My objection is to the nature of the proof. It consists wholly of certain confessions made by *Gilbert Pell* in certain conversations. There is not a single fact exclusive of those confessions in support of the charge. I agree to the doctrine in the cases cited, that it is competent to shew by parol proof that the deed was taken as a mortgage, and that the defeasance was destroyed by fraud or mistake; and I agree further, that length of time is no bar to a fraud or to redemption of a mortgage, where the mortgagee has treated it all the time as a mortgage, or where it was originally agreed that he was to enter and keep possession until he was paid out of the profits. My

(a) 2 Vern. 247, and Eq. Ca. Abr. 232, pl. 8. (b) *Vide* the late cases of *Mortimer v. Shortall*, 2 Dru. and War. 363, and *Donohue v. Conrahy*, 2 Jones & La. 688. (c) 1 John, C. C. 594.

difficulty is, that there is not the requisite legal proof of any of these allegations. There is not a single voucher or document in writing, not a single fact, act or deed of *Gilbert Pell*, that supports the charges. The whole rests on the naked, unassisted confessions of *Pell*, made to or in the presence of certain witnesses, about seventeen years after he had been in the peaceable possession of the premises, as apparent owner." See also the opinions of Chancellor *Kent* in the following cases:—*Moses et al. v. Murgatroyd et al.* (a); *Parkhurst et al. v. Van Cortlandt* (b); *Moran v. Hays* (c); and *Strong v. Stewart* (d). In this last case the bill was to redeem the mortgaged premises. The defendant set up an absolute sale, and denied the fact of a loan; but at the same time he admitted, in his answer, that after the absolute assignment was executed he gave the party, at his request, time to return the money and take back his assignment. Chancellor *Kent* said the admissions in the answer were sufficient to prove Judgment. same a mortgage against the absolute terms of the assignment, and the parol evidence was let in.

The plaintiff in the case before us has not in his bill shewn, with the exception of two matters, a single fact or voucher, act or deed of the defendants inconsistent with the terms of the deed, but the whole statements and charges are of admissions made by the defendants at different times, which they deny having made. The exceptions are these; the plaintiff says he leased the premises before the execution of the deed to one *Hopkinson* for seven years, the first year he himself received the rent, and the next seven years the defendants received the rents with his permission, towards satisfaction of the mortgage debt and interest, and after the expiration of the term *Hopkinson* relinquished the possession; and the plaintiff thereupon entered again and occupied until he was turned out by an

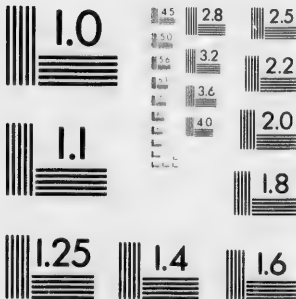
(a) 1 John, C. C. 119. (b) 1 John, C. C. 273. (c) 1 John, C. C. 339. (d) 4 John, C. C. 167.

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1850. action of ejectment; and that with the defendants' knowledge and consent, he (the plaintiff) was at all the expense of the repairs made on the premises after the same were conveyed. Neither party has examined *Hopkinson*, whose testimony would have been most satisfactory to have had. The defendants deny that *Hopkinson* was the plaintiff's tenant, and they assert that they leased the premises to him in 1837 for seven years. It is abundantly clear, from the evidence and from the plaintiff's statements, that he is in error in stating that he leased the premises to *Hopkinson* before the execution of the deed to the defendants, and also in saying he received the first year's rent. *Hopkinson's* term ended in March 1844, and he only had the place seven years, not eight years, as one part of the plaintiff's statement would seem to imply, though in another part he admits the term to be seven years; and the statement made out for the plaintiff and set forth in the bill, shews that the defendants received the whole seven years' rent; the term must have therefore commenced in 1837. The deed to the defendants was executed on the 4th July, 1836, and at that time the plaintiff was in possession, living upon the premises. We take the weight of evidence to establish that *Hopkinson's* term must have commenced in March 1837, and therefore the payment of the rent to the defendants was consistent with the deed. It was rather for the plaintiff to have produced *Hopkinson* to establish his proposition, for he claims in opposition to his deed, and if he had leased to *Hopkinson* and received any rents, it was important for the plaintiff to prove it. He has not offered a tittle of evidence upon the alleged fact of receiving rent, and what facts we have proved militate against its being true. The plaintiff's statement, that he resumed the possession of the premises after the expiration of *Hopkinson's* term, as a consequence of the fact of *Hopkinson* being his tenant, and the rents being allowed to be taken by the defen-

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dants towards satisfaction of the mortgage, is not borne out by the testimony; on the contrary, it is shewn that possession was to have been given to the defendants by the tenant at the expiration of the term, and that the plaintiff obtained the possession surreptitiously. The plaintiff has not offered any evidence to establish the fact of his having been at the expense of the repairs, for what is stated about the plaintiff allowing 5*l.* out of the rent cannot be the case. What is stated by the defendants about their offering no obstacle to the plaintiff to re-purchase, in case he repented his bargain, and the fact that their solicitor wrote to the plaintiff's solicitor, while the action of ejectment was pending, asking to know what the plaintiff would take to assign any further dispute he might have to the lot, are circumstances calculated to draw forth speculations as to the true nature of the transactions between the parties; but when we consider that these circumstances are used, not for the purpose of shewing any accident or mistake in the terms of the deed, or any fraud in obtaining the conveyance, but for the purpose of proving that the defendants did promise to execute a defeasance at a future time, they have little weight; for, as already shewn, if the plaintiff's case were true, putting out of question the circumstances of the plaintiff receiving rent and making repairs, he could not have the relief he seeks.

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Then, when we look at the defence, we find two facts stated and proved, both of which were well known to the plaintiff, and neither of them are impeached in any way, or the slightest notice taken of them by the bill—a circumstance impossible to account for. It appears that a mistake was made in the deed of the 4th July, 1836, as to the position of the lot; the plaintiff had executed a conveyance for land he did not own. The plaintiff had then received, as we must suppose, the consideration for the conveyance

1850. intended to have been made; and if there were a mistake in the deed, in its not containing a clause of redemption when it should have done so, or if the plaintiff was to have a bond for re-conveyance, then, upon its being discovered that no land was conveyed, we should have supposed the plaintiff would have insisted upon his right. A new deed was prepared for the correct premises, and on the 18th of July the plaintiff executed and delivered it to the defendants. If it be true, as the plaintiff asserts, that the first deed should have contained a clause of redemption, and that it was so agreed upon between the parties in the first instance; and if we may suppose the plaintiff, when the parties met in order to fulfil the agreement, and discovered that the deed contained no such clause, was willing to waive it, and take the defendants' verbal promise that they would execute a defeasance afterwards, yet it seems almost incredible that he would execute such second deed in its terms, if the transaction were to be a mortgage. The only account we have of this from the plaintiff is through his witness, who says, "When the second deed was executed, it was read over. The same objection was taken as at the execution of the first—that it was a *bona fide* deed, instead of a mortgage. *Howland* said it made no material difference; that he could draw a bond against the deed, which he would draw at any time, but he had not time then." There was not the slightest reason for the plaintiff doing the act hurriedly, and all he had to say to the defendants would have been that they had prepared the deed incorrectly at first; that he was incorrect in conveying to them lands he did not possess; and that having the consideration in his possession, they should not say they had not time to prepare the bond; it could have been done as easily as the deed. Then on the 29th of December, 1840, we find the plaintiff gave the defendants a receipt in full for the amount of payment for notes given for lot No. 13, in the 3rd

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concession, east-west half, township of Toronto. It does not appear the plaintiff then made any claim for a bond, or that any was promised; though, if we are to believe the evidence of *George Stewart*, he asked the defendants about the bond about a year after the execution of the deed, and which would be about three years before the receipt was given.

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If we were to hold that the plaintiff had stated a sufficient case, and had opened the door for the reception of parol evidence, then, is the evidence which is offered here sufficient to enable the court to grant the plaintiff the relief sought?

The plaintiff objects, that the decree cannot be reviewed on the ground of the credit to be given to the testimony; that the court below is the proper court to judge upon the degree of credit to be attached to the witnesses. The cases cited do not support the proposition, and it is quite clear that the constant practice is to appeal from decisions of fact as well as law. Mr. *Daniel* thus states the principle:—"In fact, whenever the court is called upon to determine a question of law or of fact, the decision may be the subject of a re-hearing on appeal by any party who considers himself aggrieved by it. The only case in which a party cannot appeal from the decision of the court is, where the determination complained of is merely the result of the exercise of discretion on the part of the judge, in a case where the matter was fairly a subject for the exercise of discretion: in such cases the practice of the court will not allow an appeal from the discretion of one judge to that of another."

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The only witnesses the plaintiff can rely upon to make out his case, are *Graham* and *George Stewart*—that is, without their testimony no case would be made out. The statements of these witnesses are so contradictory to each other, and so much at variance

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with the facts, that it would be most unsafe to place any reliance upon their statements. As already remarked, it was very important to the plaintiff to make out that *Hopkinson* was his tenant, and that he received from *Hopkinson* one year's rent, and permitted him to pay the rest to the defendants towards satisfaction of the mortgage. There is no question but that *Hopkinson's* term ended March 1844, and that the plaintiff was himself in possession July 1836. Neither *Graham* nor *George Stewart* assign a longer possession to *Hopkinson* than seven years, and seven years' rent is what the plaintiff seeks to make the defendants accountable for. *Graham* says *Hopkinson* was moving on the premises when the deed was executed: he moved on, he thinks, in April, and yet he says he lived on the premises seven years. Again: he says that the plaintiff leased to *Hopkinson* in the March before the deeds were executed; he had possession in April or May; they had made their bargain in the fall before, which would be 1835, and *Hopkinson* was to go on the 1st of April; *Hopkinson* was on the place when the deeds were executed, and for months before, and the lease was to be for seven years; he understood from all parties that *Hopkinson* was to pay the rent to the defendants, and the lease was to be so drawn. It requires a drawing upon the imagination to credit a statement that a lease was to be made in March 1836, to pay rents to the defendants, when the transactions between the plaintiff and the defendants did not occur till the July after. *Graham* says, further, that *Hopkinson* agreed to pay the rent to the defendants, as it did not matter to him to whom he paid it, and that he was present when the deed was executed. *George Stewart* says that he could not say whether *Hopkinson* went into possession a little before or after the deed was executed, and that he is sure he was not present when the deed was executed. Again: he says before the deed was executed the rent was 35*l.* a-year, and 5*l.* was

deducted or allowed to the tenant off the first year's rent for the repair of fences, and 30*l.* only for that year was charged against the defendants. He further says that before the deed was executed, he made the bargain for the plaintiff with the defendants, that they were to have the rent of the place for the purpose of paying any debt which the plaintiff owed them. Now, when we turn to the written memorandum made out by *George Stewart*, and set out in the plaintiff's bill, it shews the first year's rent to have accrued due in March 1838, and to be charged as 30*l.* against the defendants, and thereby establishing that *Hopkinson's* term commenced in March 1837, at a time when, by the effect of the conveyance, the defendants were the owners of the premises. It is quite impossible to believe the statements of *Graham* and *George Stewart*, when they say that any arrangements were made at or before the time of the execution of the deed whereby *Hopkinson* was to pay rent to the defendants. *Graham* tells us that the agreement was, that plaintiff should pay the defendants 20 per cent. per annum by way of interest; and yet we see the defendants were to advance 150*l.* of the amount in instalments, at one, two and three years, without interest. *George Stewart* says that the notes were taken because it was a deed that was given instead of a mortgage. If we believe the giving of a deed to have been a sale, then taking notes for the consideration we can understand; but it is difficult to understand why a mortgage should be created, the consideration for which was not to be advanced for such a length of time after its creation. Many other inconsistencies might be shewn between the statements of these witnesses and the facts of the case, but what I have stated shews the nature of the evidence, and how unsafe it would be to make a solemn instrument depend upon such uncertain testimony.

The result is, that the decree of the court below should be reversed, and the plaintiff's bill be dismissed with costs in the court below.

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ov. 29 and
Dec. 24.

MARTIN V. KENNEDY.

Land Patents—Pleading—Demurrer.

This court has jurisdiction under the provincial statute, 4th and 5th Victoria, chapter 100, sec. 29, to rescind a patent for land, though the grant may be voidable, or even void at law.

A demurrer to part of a bill, unaccompanied by an answer to the rest is informal, and would be over-ruled.

A demurrer to a supplemental bill, "except so much of it as is authorised by an order of the court," set forth in it, is informal, and would be over-ruled for not defining with sufficient certainty the parts of the bill to which the demurrer refers.

Where a cause having come on to be heard on the pleadings and evidence, stood over to add a party, and the plaintiff filed a supplemental bill, supplying this defect, and setting forth additional matter, and a new ground for relief, the same being alleged to have come to the plaintiff's knowledge after the hearing, a demurrer, on the ground that the supplemental bill, so far as it contained such new matter had been filed without leave of the court, was over-ruled.

An original bill having been filed, seeking relief against a patent, as having been issued in ignorance of the plaintiff's rights, and at a subsequent stage of the cause a supplemental bill having been filed, setting forth matter of which the plaintiff was ignorant when he filed the original bill, and on which he impeached the patent itself as void—a demurrer to such supplemental bill was over-ruled.

The original bill in this cause was filed on the third day of May, 1845, by *Donald Martin* and *John McLellan* against the Reverend *Thomas Smith Kennedy*, setting forth the practice which prevailed in the Crown Lands Office, of leasing the lands held as clergy reserves, with a covenant for renewal and a clause giving the lessee a right of pre-emption; that in August, 1831, one *Nathan W. Tripp* applied for a lease of lot 25, in the first concession of *Darlington*, (a clergy reserve), and received an answer to the effect that he would receive the same; whereupon he paid to the secretary of the clergy corporation the fees upon such lease, and took a receipt therefore; and without waiting for the actual issuing of the patent went into possession personally; That after divers mesne assignments which were set forth, the interest of *Tripp* in the south half of the lot became vested in the plaintiff *Martin*, by purchase, in May, 1837: and *Tripp's* interest in the north-half became vested by purchase in the plaintiff *McLellan*, in December of the same year; and that *Tripp* and his assignees had successively been in

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possession ever since 1831, and had made many valuable improvements on the property: That by letters patent, dated in January, 1836, a parsonage or rectory was established within the township of Darlington, and thereby the said lot number twenty-five, together with other lands, were set apart as glebe and endowment, to be held appurtenant with such rectory; that this patent had been issued by mistake, and in ignorance on the part of the government of the claims of the plaintiffs; that some years afterwards the defendant had been duly inducted into, was then the incumbent of such rectory, and had commenced actions of ejectment against the plaintiffs; that in consequence of a reference to Mr. *Baines*, the clerk of the clergy corporation, by the government of Upper Canada, to ascertain the position of their lands, he had employed one *Wilmot*, a deputy provincial surveyor, who had reported that he had seen and consulted with the persons in possession, and that they had expressed their willingness to hold the said lands under the church, on the same terms as they held under the Crown; and thereupon *Baines* reported to the same effect to government, who thereupon, by order in Council of January, 1836, under the mistaken belief that such report was correct, appropriated the said lot 25 and other lands to and for the said rectory, and that the said order in council contained a statement to the following effect: "Pursuant to the views of Lord *Goderich*, shown by his dispatch of the 5th of April, 1832, * * * * * the council caused the necessary steps to be taken for the purpose of setting apart lots in each township throughout the province. Much delay has been caused by their anxiety to avoid interfering with persons who might have acknowledged claims to any of the reserves to be selected either for lease or purchase."

The bill prayed—that the letters patent might be declared void, either wholly or as to the said lot

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1850. twenty-five; for an injunction, restraining the defendants from prosecuting the said actions of ejectment; and for further relief.

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The defendant having answered, and the cause being at issue and a rule to produce pending, the plaintiff, on the 16th day of February, 1849, filed a supplemental bill, the effect of which it is not necessary to set forth.

To this bill the defendant, on the 21st day of March 1849, put in his answer.

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Upon these pleadings and the evidence which had been already taken, the cause was brought on for hearing on the 27th day of August, 1850, when it appeared that his Lordship the Bishop of Toronto was a necessary party to the suit, whereupon the cause was ordered to stand over, with liberty to the plaintiffs "to amend their bill of complaint, by making the Bishop of Toronto a party thereto, with allegations applicable to the case of the said Bishop when made a party, by supplemental bill or otherwise, as they may be advised."

Under the order so made the plaintiffs, on the 29th day of October following, filed a further supplemental bill, stating the order to amend by adding the Bishop of Toronto as a party, containing the necessary allegations for the purpose of making him a party; and that since the hearing of the cause, and in the month of August 1850, it became known, and then for the first time, to *Alexander McDonald*, Esquire, who had the conduct of this cause as the solicitor for the plaintiffs, and subsequently and in the month of October following, and then for the first time, it became known to the plaintiffs, by a communication to them from their said solicitor, that the despatches thereafter referred to were in existence; and then, setting forth

a number of despatches and documents, with the view chiefly of making out that the creation and endowment of rectories were unauthorized, invalid and illegal acts, and praying against the defendants the same relief as was prayed by the original bill against the defendant thereto.

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The defendant *Kennedy*, on the 19th day of November, 1850, put in a demurrer, unaccompanied by any answer, as to so much of the said further supplemental bill as purports to put in issue or contains any statement, charge, allegation or interrogatory respecting, or seeks any relief founded upon the despatches and documents, or any or either of them, or any part of any or either of them, in the said further supplemental bill mentioned or set forth, and not in issue in the cause prior to the filing of the said further supplemental bill; and as to so much of the said further supplemental bill as seeks any discovery in respect of the despatches and documents aforesaid, or any or either of them, or anything in them or either of them said to be stated or contained; and as to so much of the said further supplemental bill as seeks to set up that the patent in question in this cause is illegal or bad, and ought to be rescinded on account of any circumstances stated in the said further supplemental bill, and not before stated in the pleadings in this cause; and as to all parts of the said further supplemental bill, except so much thereof as is authorised by order of this court, made on the hearing of this cause and recited in the said further supplemental bill, on the following grounds:

[1st.] "That the said further supplemental bill states the said despatches and documents to have been in existence long before the filing of the original bill in this cause, and it is not sufficiently stated or shewn, in or by the said further supplemental bill, that the existence of the said despatches and documents was

1850. unknown to the solicitors or solicitor of the plaintiffs who filed the said original bill, or who have or has conducted the proceedings in the cause, or that their existence was unknown to the plaintiffs through their solicitors or agents or otherwise, when the said original bill was filed or before the cause was at issue, or that the said despatches or documents, and the statements respecting them, could not have been put in issue in the cause by amendment of the original or first supplemental bill in this cause."

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[2nd.] "Also that the matters introduced into the said further supplemental bill, and as to which this defendant demurs as aforesaid, might have been, if proper to be put in issue in the cause at all, put in issue on a proper case shown by way of amendment, and are not properly pleaded by way of supplement."

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[3rd.] "Also, that the said further supplemental bill, so far as it contains the matters and things as to which as aforesaid this defendant demurs, does not purport to be filed with the leave of the court."

[4th.] "Also, that the order in the said further supplemental bill recited, under which the said further supplemental bill purports to be filed, did not contemplate and does not provide for the filing of a supplemental bill containing such matters as those as to which this defendant demurs as aforesaid, and that so far as the said further supplemental bill contains such matters, it is in fact a bill filed without leave of the court, contrary to the course and practice of the court."

[5th.] "Also, that the said further supplemental bill in the said parts as to which this defendant demurs as aforesaid, states a new case, differing from and inconsistent with the case stated in the plaintiffs' original and first supplemental bills, and seeks to

change the issues raised by the said original and first supplemental bills, and to raise issues inconsistent with the issues raised by the said original and first supplemental bills." 1850.

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[6th.] "Also, that the case stated in the said further supplemental bill, in the parts so demurred to as aforesaid, seeks to impugn the legal validity of the patent in question in this cause, and if the said patent is legally invalid or bad in law, then, as this defendant is advised, the said plaintiffs can have a complete and adequate remedy at law, and could have successfully defended the ejectments in the original bill mentioned, and are not entitled to any relief in this honorable Court in respect of the said patent."

[7th.] "Also, that the case set up by the said further supplemental bill, in the parts to which this defendant demurs as aforesaid, goes to shew the invalidity of the said patent and to make a case for its repeal, on grounds different from and inconsistent with the grounds on which the repeal of the said patent is sought in the said original and first supplemental bill, and the said bills purporting or professing to be a further supplemental bill, is in the parts aforesaid framed as an original bill." Statement.

[8th.] "And also, that the validity at law of the said patent is admitted by the plaintiffs, by the filing on their parts of the original bill, seeking the repeal in equity of the said patent, and that the attempt in the said parts of the said further supplemental bill, so demurred to as aforesaid, to impugn the legal validity of the said patent, is at variance with and contradicts the case sought to be made by the said original and further supplemental bills."

Mr. R. Cooper, in support of the demurrer, cited, amongst other cases, *Colclough v. Evans* (a); *Houl-* Argument.

1850. *ditch v. Mayor of Donegal* (a); *Field v. Delaney* (b);
 Martin v. Kennedy. *Strickland v. Strickland* (c); *Hodson v. Ball* (d); *The*
Attorney-General v. The Fishmonger's Company (e);
 also *I. Grant's Ch. Prac.* 69, and *Daniel's Prac.* 1655,
 and notes.

Argument. Dr. Connor, Q. C., and Mr. McDonald, contra,
 cited *Wood v. Wood* (f); *Jones v. Howells* (g);
Bignal v. Atkins (h); *Goodwin v. Goodwin* (i);
Crompton v. Wombwell (j); *Greenwood v. Atkinson*
 (k)—relying strongly on the cases of *Wood v. Wood*
 and *Crompton v. Wombwell*—also *Daniel's Prac.*
 459, 1654-5-6-60-81.

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 was filed for the purpose of setting aside a patent,
 alleged to have been issued in ignorance on the part
 of the crown of the plaintiffs' rights. A supplement-
 tal bill was filed for the purpose of putting in issue a
 matter which occurred subsequently to the com-
 mencement of the suit; and both bills having been
 answered, and witnesses having been examined, the
 case came on to be heard, when the court was of
 opinion that it was defective for want of parties, and
 it was consequently ordered to stand over, with liberty
 to the plaintiffs to amend their bill by making the
 Lord Bishop of Toronto a party to the suit. Upon
 this the plaintiffs file a further supplemental bill, not
 confined to the making the Bishop a party to the suit,
 and such allegations as were absolutely necessary for
 that purpose, but putting in issue a variety of matters
 alleged to have been discovered after the hearing of the
 cause. To this bill a demurrer has been put in on
 various grounds, and the question for my decision is,
 whether or not it can be sustained.

(a) 1 S. & S. 491. (b) 1 Moll. 174. (c) 12 Sim. 253. (d) 1 Ph. 177.
 (e) 4 M. & C. 1. (f) 3 Y. & C. 580; S. C. 4 Y. & C. 135. (g) 2 Hare,
 342. (h) Mad. & Gel. 369. (i) 3 Atk. 370. (j) 4 Sim. 628. (k) 5 Sim. 419.

* The Chancellor had been concerned in the case while at the bar.

I may observe at once that the demurrer appears to me to be informal, and liable to be overruled on two grounds, which were not noticed on the argument. One is, that it is addressed to part of the bill only, and yet is not combined with an answer to the rest of the bill, so as to make the pleading cover the whole bill; the other, that it does not define with sufficient certainty the part of the bill to which it was intended to apply. With regard to the first point, I apprehend it to be quite irregular to file a demurrer to part of a bill, without putting in an answer to the remainder. I never saw such a pleading; and all the forms of partial demurrers which are to be found in the books, and every mention which is there made of such a demurrer, points to and pre-supposes the necessity of an answer accompanying it. The case of *Devonsher v. Newnham* (a) is an authority for both these positions. Lord Redesdale there says, "The defendant ought to demur to a particular part of the bill, specifying it precisely, and answer to all the rest;" and it was held there that an answer to so much of the bill as the defendant was advised he was bound to answer to, and a demurrer to the rest was informal and bad. In the present case the demurrer, besides wanting an answer to apply to the part of the bill not covered by it, would impose upon the court and the Master the duty of examining all the pleadings in the cause, and to put a construction on the order of the 7th of November, in order to ascertain what part of the bill was covered by the demurrer, and what part the defendants ought to answer. The orders of court which relate to demurrers I have consulted, and they do not appear to me to make any difference in this respect. It is as necessary now as ever it was to define the respective parts of the bill to which a demurrer and answer apply, although if in answering the part intended to be answered, somewhat of the part demurred to is

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(a) 2 Sch. & Lef. 199.

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covered, the same inconvenience does not result now as formerly.

For these reasons I should think this demurrer informal, and that I ought to overrule it independently of the grounds upon which it is expressly placed; but as I should not award any costs to the plaintiffs in this case, the points in question not having been noticed in the argument, but being suggested altogether by the court, it is necessary to examine in detail the grounds upon which the demurrer is expressly founded.

Judgment.

The first ground appears to be very irregularly stated. It includes the whole of the bill that is demurred to, but assigns a reason applicable in terms only to part. It says that the despatches and documents referred to must be deemed to have been known to the plaintiffs or their solicitors before the cause was at issue, and therefore they, and also the other matters covered by the demurrer, might have been introduced by amendment. I am considering the first and second grounds of the demurrer at once, as they in fact form together only one ground. They amount to this, that the despatches and documents in question must be deemed to have been known to the plaintiffs before the cause was at issue; it is to be inferred from this fact that the other matters covered by the demurrer were also then known to them; and therefore the whole might have been introduced by way of amendment, and are not properly the subject of a supplemental bill. Upon this subject the bill states in effect that the existence of the despatches and documents in question became known to the plaintiffs and their solicitor for the first time after the hearing of the cause. I cannot infer, in the absence of all allegation on the subject, that the plaintiffs ever had any other solicitor than the one named. It is only inferred that the plaintiffs and

their solicitor had a knowledge of the other facts included in the demurrer from their alleged knowledge of the despatches and documents; and this being negatived by the bill, the other is negatived also: but in fact the bill proceeds to state that the plaintiffs and their solicitor were wholly ignorant of the existence of the despatches and documents in question, and of the facts stated by way of further supplement until the respective times before mentioned. I think, therefore, that it sufficiently appears by the bill that the matters stated in it could not have been introduced by way of amendment, inasmuch as they did not become known to the plaintiffs or their solicitor until after the hearing of the cause. There was nothing in the nature of the case, or the information which they already had, to induce, in the exercise of a reasonable caution, further inquiry; nor can it be said that they ought and must be deemed to have known the material facts stated in this supplemental bill in time to have enabled them to introduce them into the record by way of amendment. The demurrer, therefore, so far as it rests upon these grounds, cannot be sustained.

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The next ground which it takes is, that the supplemental bill is filed without leave of the court, for that the order under which it purports to be filed does not warrant it, and it does not otherwise purport to be filed with the leave of the court. This reasoning pre-supposes that the leave of the court was necessary to the filing, under the circumstances of this case, a supplemental bill, containing the matters to which the demurrer applies. No authority was cited which supported this position, and the cases establish, I think, a contrary rule. It is quite clear that a supplemental bill, in the nature of a bill of review—that is, a supplemental bill filed after a decree, for the purpose of impeaching it—requires the leave of the court to its being filed. This, however, is not a

1850. bill of that description. The hearing having been adjourned in order to enable the plaintiffs to bring a new party before the court, the cause had not in fact reached the hearing, and the supplemental bill was filed before the hearing, and consequently before decree. Upon this point the plaintiffs in the argument of the demurrer took two grounds—one, that the order of the 7th of November authorized a supplemental bill containing all the allegations which were objected to by the demurrer, the other, that, the cause having stood over, in order to enable the plaintiffs to bring a new party before the court, they had a right to file a supplemental bill containing the allegations in question, independent of the order of the 7th of November; and as that order authorized the filing a supplemental bill, in order to bring the new party before the court, it was not irregular to combine the two supplemental bills in one. It is not necessary for me to decide whether the order in its terms authorized the filing of a supplemental bill containing the matters which are to be found in this supplemental bill. I may remark that I have no regular evidence of this order before me, for the statement of it in the bill is not included in and therefore not admitted by the demurrer; and there is, as I have already mentioned, no answer to the part of the bill not covered by the demurrer. Judging however, of the terms of this order from the statement of it contained in the bill, I should say, with reference to the case of *Mason v. Franklin* (a), that there is considerable ground for contending that it authorized all the allegations contained in this supplemental bill. But the second ground on which the plaintiffs rest the bill is, I think, sufficient to sustain it. The cases of *Greenwood v. Atkinson* and *Wood v. Wood*, shew that an order to amend by adding parties authorizes a supplemental bill for that purpose; and where the plaintiff has, independently of that order,

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(a) 1 Y. & C. 22.

a right to file a supplemental bill for other purposes, the two bills may be combined in one. The question then is, whether, supposing the plaintiffs to have discovered these matters after publication, they could before the hearing have filed such a supplemental bill as the present one, without the leave of the court. In *Wood v. Wood*, it was assumed that the plaintiff might have filed the supplemental bill in that case, so far as it prayed additional relief, without the leave of the court, which might admit of question. But the cases of *Walford v. Pemberton* (a) and *Crompton v. Wombwell* (b), are clear authorities that a supplemental bill may be filed before decree for the purpose of putting in issue matters discovered after publication, without the leave of the court. None of the text books lay it down that the leave of the court is necessary for filing such a bill, and the only authority for that position is a suggestion contained in the case of *The Attorney-General v. The Fishmongers' Judgment Company*. In the case of *Colclough v. Evans*, the Vice-Chancellor of England had decided that a supplemental bill before publication, for the purpose of putting in issue matters which had happened before the commencement of the suit, was improper, because those matters might have been introduced by amendment; and to permit the introduction of such matters by supplemental bill, when an amendment for that purpose would not be allowed, would be an evasion of the general orders of the court. This plain and intelligible principle seems to have been lost sight of by the learned Vice-Chancellor, when, in deciding the case of *Walford v. Pemberton*, he endeavoured to distinguish the case of *Colclough v. Evans* from that of *Crompton v. Wombwell*, in which he overruled a demurrer to a supplemental bill filed for the purpose of putting in issue newly discovered matter. Upon this occasion he said that as the object of the supplemental bill in *Colclough v. Evans* was to vary a

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(a) 13 Sim. 441.

(b) 4 Sim. 628.

1850. *statment in the original bill, or to state a matter there stated differently, it was properly matter of amendment, and not of a supplemental nature; whereas the supplemental bill in *Crompton v. Wombwell* was for the purpose of introducing new matter upon the record. Now I should have thought that whenever the matter to be introduced had happened before the commencement of the suit, it was equally matter of amendment, whether it was entirely new or had before been erroneously stated, provided the suit was in such a state as to admit of an amendment; and that the matter introduced in *Crompton v. Wombwell*, was as much matter of amendment as that introduced in *Colclough v. Evans*, between which and *Crompton v. Wombwell* the real distinction was that one was before publication and the other after it. Mr. Daniel lays it down that a supplemental bill, for the purpose of putting newly discovered matter in issue, is now unnecessary before publication, because the bill in a proper case can be amended for that purpose; and I cannot help thinking that if the question should come under review before the Lord Chancellor it will be decided that a supplemental bill cannot, since the new orders, be filed after replication and before publication, for the purpose of putting in issue matter discovered after replication, because under those orders the bill may be amended for that purpose, and a supplemental bill will never be permitted where an amendment is practicable. It is clear, however, I think, upon the authorities, that a supplemental bill may be filed without leave of the court, before decree, for the purpose of putting in issue matter discovered after publication; and that, if the cause had previously stood over, with liberty to the plaintiffs to amend by adding parties, and a supplemental bill is filed for this purpose, the two bills may be combined. This is what has been done in the present case, and therefore I think that the demurrer must be overruled, so far as it stands upon*

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udgment.

the supplemental bill being filed without leave of 1850.
the court.

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The next ground upon which the demurrer rests is, that the supplemental bill states a new case, different from and inconsistent with that stated in the original and first supplemental bills, and seeks to change the issues thereby raised, and to raise new issues inconsistent with those issues. This part of the demurrer is, I think, unfounded in fact. The case stated by the supplemental bill is not new, but simply additional; it is no further different from that stated in the original bill, and is certainly not inconsistent with it, since they might both have been stated in the original bill, had they been known at the time of filing it. The issues are not changed, for the original issues remain wholly untouched and unimpaired, and the issues raised by the supplemental bill are merely additional to the former issues, not new in the sense in which that word is used in the demurrer, and not inconsistent with those issues. It is very probable that the supplemental bill presents a case and raises issues which it is competent only to the crown to insist upon; but in this case the defendant should have demurred from want of equity, and not have rested his demurrer upon an alleged inconsistency which does not exist. The whole of this case, and all these issues, might have been united in one record by a party entitled to insist upon them.

Judgment.

The next ground of the demurrer is, that the supplemental bill impugns the legal validity of the patent in question in this case, and that the plaintiffs could have a complete remedy at law, and are therefore not entitled to relief in this court. But this reasoning proceeds, I think, upon a misapprehension of the provision in the act of parliament upon which this suit is founded. I think the remedy afforded by this provision is applicable, although the patent may be

1850. voidable or even absolutely void at law; so that *non*
concessit might be pleaded to it. A first patentee
might, I think, proceed in this court, under the provi-
sion in question, for the repeal of the second patent,
although of course it would be absolutely void; and
so, admitting that for the reasons assigned in the
supplemental bill, this patent is absolutely void at
law, it is nevertheless highly reasonable that it
should be pronounced invalid by a direct decree of
this court, *in rem.* (a). This ground of demurrer
must therefore, like the preceding one, be disallowed.

Judgment.

The next ground of the demurrer is, that the supplemental bill, is an original bill, because it impugns the patent in question on grounds different from and inconsistent with those stated in the original bill. The grounds presented by the supplemental bill for avoiding the patent are additional to, but not otherwise different from, and not inconsistent with, those mentioned and insisted upon by the original bill; and as these matters could have been joined in the original bill with the matters there stated, or have been introduced into it in addition to those matters by amendment, had they been known in time, I cannot consider this supplemental bill as an original bill, or that the demurrer can be supported on this ground. The only remaining ground taken by the demurrer is, that the original bill admits the validity of the patent at law, and seeks to avoid it on equitable grounds; whereas the supplemental bill impugns its legal validity, and it is therefore inconsistent with, and contradictory to, the original bill. The supplemental bill, however, cannot be considered as at variance with, or contradictory to, the original bill, for engrafting upon it matter which could have been originally contained in it, or could have been introduced into it by amendment, had it been discovered in time for that purpose.

(a) 2 Roll. Ab. 191, U. pl. 2; 4 Inst. 88; Dyer, 198, a.

As all the grounds therefore taken by the demurrer, are disallowed, I think the plaintiffs are entitled to their costs; although, if I had overruled the demurrer as informal, for the reasons I have mentioned, I should not have given the plaintiffs their costs.

1850.

Martin
v.
Kennedy.

Judgment.

O'KEEFE V. TAYLOR.

Specific performance—Laches.

Where a party agreed to sell a lot of land, and at the time of entering into the contract an instalment of one-fifth of the purchase money was paid down, the balance being payable in four annual instalments, and the vendee was let into possession, and continued in the occupation of the land, but without making any further payment on account of the purchase, notwithstanding frequent applications were made to him on behalf of the vendor for that purpose—at the expiration of about three years from the time of entering into such contract, the vendor re-sold and conveyed the land to another party who had notice, and the purchaser afterwards commenced an action of ejectment against the first vendee, who thereupon filed a bill for specific performance of the contract, against the vendor and such second purchaser: *Held*, that the delay which had occurred was not, under the circumstances, sufficient to disentitle the plaintiff to the relief sought.

Dec. 3, 1850,
and
Feb. 11, 1851

Semble, that the peculiar condition of real property in this province, and the peculiar practice which has grown up in relation to sales, may require a modification of English cases as to the doctrine of laches.

Semble, that when one party to a contract (in which time is not of the essence) desires to put an end to the contract, in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end.

The bill in this case was filed on the 17th day of October, 1845, by *John O'Keefe*, against *Eliza Taylor* (residing in Quebec), *George Boulton* and *Donald Campbell*, stating, amongst other things, that in January 1842, the defendant *Taylor*, through her agent *Boulton*, contracted, by an instrument in writing to sell one hundred acres of lot No. 20, in the third concession of the township of Cramahe, to the plaintiff and one *John Hinds*, who thereupon paid 15*l.*—part of the purchase money—and went into possession of the property; that default having been made by plaintiff in payment of purchase money, *Boulton*, acting as such agent, sold to the defendant *Campbell*, who had notice of plaintiff's claim, and that he (*Campbell*) had instituted proceedings in ejectment against plaintiff.

Statement.

1850.

O'Keefe
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Taylor.

The bill prayed a specific performance of the contract, an injunction to stay the proceedings in ejectment, and further relief.

Statement.

The defendant *Boulton* had been examined as a witness in the cause on behalf of the defendants; and in his evidence on cross-examination swore, that he had written several letters to *O'Keefe* and *Hinds*, calling upon them to make further payments on account of the purchase, otherwise, that he would sell the property to some one else; but could not state that they ever received the letters so sent. He permitted them, notwithstanding, to retain possession of the land, but complained of their having committed depredations on the land by cutting down all the valuable timber, though he would not have made any complaint of their so doing had they made their payments regularly; and that whenever he saw the parties, he told them that unless the payments were completed he would sell to some other person; but did not state any precise time within which they must pay. The last time he had seen *O'Keefe* was six or twelve months before the sale to *Campbell*.

It appeared that *Campbell* had obtained an assignment or re-lease of the interest of *Hinds*; and had executed a mortgage to *Boulton* to secure part of the purchase money.

Argument.

Mr. *Eccles* and Mr. *Strong* for the plaintiffs.
Mr. *Vankoughnet*, Q. C., for defendant *Taylor*.
Mr. *R. Cooper* for defendant *Campbell*.
Mr. *J. Crickmore* for defendant *Boulton*.

For the plaintiff, *McDonald v. Elder*, (a) was relied on as entitling the plaintiff to a specific performance of the contract.

The counsel for the defendants contended that the

(a) Ante vol. I, p. 241.

notice given by *Boulton* as agent for the vendor was sufficient to determine the contract and prevent the court from interfering in his behalf, especially after the laches of which he had been guilty.

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O Keefe

v.
Taylor.

THE CHANCELLOR.—This bill is filed by the purchaser of the south half of lot number twenty, in the third concession of the township of Cramahe, for the specific performance of a contract of sale, entered into with him by the defendant *Taylor* through the instrumentality of the defendant *Boulton*, who was her agent. The contract in question was executed on the 31st of January, 1842; and upon that occasion the plaintiff and one *Hinds*, who were the joint purchasers, paid one-fifth part of the purchase money in hand, and stipulated to pay the remaining four-fifths—amounting to 60*l.*—in three equal annual instalments, with interest. Upon the execution of the contract, the purchasers were let into possession of the premises, which consisted altogether of forest land, and the plaintiff was still in possession at the commencement of the present suit, having in the interim cleared and brought into cultivation a considerable portion of his moiety of the property. On the 21st of December, 1844, *Hinds* transferred all his interest in the contract to the defendant *Campbell*; and on the 15th of the ensuing month of January, Miss *Taylor*, through her agent *Boulton*, re-sold to him the whole of lot number twenty, in the third concession of Cramahe, including, of course, that portion for the purchase of which the plaintiff had contracted. Up to the period of this re-sale, the plaintiff, on the one hand, had neglected to make any further payment, and the defendant, on the other hand, had taken no step either to enforce such payment or to determine the contract: the plaintiff continued in undisturbed possession.

Judgment .

The facts thus far are for the most part common to both parties, and such as are not so cannot be said,

1851. in my opinion, to be subject to any reasonable doubt.
 O'Reefe An allegation is to be found in the answer, indeed,
 yes, that this was not a perfect sale, but an initiatory proceeding of some undefined description, to become a sale upon the performance of certain conditions; and some evidence would appear to have been adduced in support of that allegation. But the position is obviously untenable; and upon the hearing it was fairly admitted on the one side, that the plaintiff had established a perfect contract, with a sufficient memorandum in writing, had that been requisite; and, on the other side, that all the interest of *Hinds* had been effectually transferred to *Campbell*. It was not argued that *Campbell* had purchased without notice of the plaintiff's contract. The reverse is obvious. But the plaintiff's right to specific performance was denied—first on account of the laches of which he had been guilty; secondly, because of his wrongful conduct in improperly felling timber during his occupation.

Judgment

But, while the amount involved in this litigation is extremely insignificant, and although the facts of the case are little complicated, still the principle to be established is of great magnitude and importance. Not to repeat the observations which were made in *McDonald v. Elder*, with reference to this branch of equitable jurisdiction in general, I must be permitted to observe that it is impossible to contemplate the vast extent of property in this province held under contracts similar to the present, and the very peculiar position in which the parties to such contracts are placed, without being forcibly struck with the paramount importance of proceeding, in relation to them, upon clear and settled principles. We are not dealing with the casual transfer of real property in a fully occupied and thoroughly cultivated country, but we are about to define the position of multitudes by whom a country is being peopled—by whose enter-

prise and labour the wastes of this vast province are rendered subservient to the purposes of civilization with unexampled rapidity. Under such circumstances, where the habit of holding land for considerable periods, under contracts similar to the present, so extensively prevails, and where the value of the soil so materially depends upon the labour of those who occupy under that sort of tenure, it is of vital importance, not only to the attainment of justice in particular cases, but to the general welfare, that, in this court, where alone such contracts can be enforced, the numerous titles which depend exclusively upon this jurisdiction for their validity, should not be shaken by the introduction of doctrines, which, however suited to other states of society, have no application in our present social condition, but that they should be shewn to rest upon settled and solid foundations. But were we to apply the rule to be deduced from some of the English cases which were cited, especially some of the latter cases, upon the subject of delay, without reference to the totally different social condition of this country, we should not only produce great practical evil and injustice, but should also, in my opinion, very much misapply a doctrine which in England would never have been laid down under the circumstances in which we are placed. Take, for example, the case of *Gee v. Pearse* (a), which was not cited, but which, as a very recent decision upon the subject, may be mentioned. There, a bill filed by a purchaser for specific performance of a contract, was dismissed upon the lapse of a few days from the cessation of negotiations. Now, assuming that case to be well decided, one cannot help feeling that the application of such a rule to the ordinary contracts of sale in this country, would be productive of so much injustice as to call for legislative interference. But it is obvious that such rules cannot be safely applied without a careful consideration as well

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(a) 2 D. & S. 325.

1851. of the circumstances of the particular case, as of the habits which have grown up in the country in relation to such contracts. The doctrines which govern this branch of equity jurisdiction, and especially the rules in relation to delay, have been from time to time considerably modified. Whether this change be attributable to the altered habits of the people, and the altered condition of property, or to change of judicial opinions, we need not now consider: it may be traced, perhaps, as much to the former as the latter source. And not only has the system, (as administered at different periods) varied, but, as the doctrines now in force sprang into existence, and their applicability to new cases came to be determined, such doctrines were, as a matter of course, modified and controlled by the circumstances of the case to which they were about to be applied. In determining, for instance, the materiality of time, the same rule was not applied to all sorts of contracts, under all varieties of circumstance. The rule was modified with reference to the subject matter of the contract, and the position and object of the parties. The purchase of a leasehold interest, or a reversion, was not governed in this respect by the rule which had been considered applicable to the purchase of an estate in fee simple; and a contract entered into with a view to an immediate residence, or for the purpose of a trade, was placed upon a very different footing, in this respect, from an ordinary purchase. If, then, the doctrines propounded by English courts of justice upon this subject, in relation to English contracts, have been from time to time modified, upon reasons growing out of a consideration of the subject matter of the contract, and the position and object of the parties, it cannot be doubted I think, that when considering in this court the applicability of those doctrines to contracts entered into in this country, reference must always be had to our different social condition, for the purpose of determining whether there is not, in such difference, that

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which ought in reason to modify the rule. Such, 1851.
 circumstances would not have been overlooked by
 English judges, had they existed in that country; to
 omit the consideration of them where they do exist,
 is, not to administer English law upon English prin-
 ciples, but blindly to apply a rule without reference
 to the circumstances, upon the consideration of which
 alone its applicability can be determined.

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 Taylor.

Before proceeding to consider the effect which the
 delay that has taken place in this case ought to have
 upon the plaintiff's right to specific performance, it
 may be useful to state some points which have been
 settled upon the subject. The rule said to have been
 propounded in some of the older cases, as to the total
 immateriality of time in such contracts, has been
 condemned as too loose. In that opinion I quite
 concur. But what I must take leave to doubt is,
 whether recent decisions have tended to place the
 matter on a satisfactory footing. We cannot contrast
 the case of *Gee v. Pearse*, to which I have before
 referred, with *Soutacomb v. The Bishop of Exeter* (a),
 recently decided by Sir James Wigram, without
 enquiring whether it be not possible and expedient,
 that the effect of delay upon the right to specific
 performance, should be made to depend upon
 some rule better defined than mere judicial discre-
 tion. Some points, however, have been settled,
 which may be useful in enabling us to arrive at a
 proper conclusion in the present case. In the first
 place, time may be made of the essence of the con-
 tract. I take it to be clear, however, that here, time
 neither has been made, in express terms, nor is it,
 from the nature of the thing, of the essence of this
 contract. But where time is not of the essence of the
 contract, it by no means follows that parties are at
 liberty to postpone indefinitely the fulfilment of their
 agreements. It is competent to either party, where

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(a) 6 Hare, 219.

1851. there has been unreasonable delay, to make time material, by notice requiring completion of the contract within a reasonable period, and where such notice has been given, and the party has failed to comply, bills afterwards filed for specific performance have been dismissed. *Heapy v. Hill* (a), and *Watson v. Reid* (b), which were cited in the argument as favorable to the defence, turned, not upon the effect of delay merely, but upon delay after notice (c). In *Taylor v. Browne* (d), Lord Langdale says: "Now, as I have before stated, where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract, in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs."

Judgment.

In *King v. Wilson* (e) the same learned judge observes: "The first question in this case is, whether the contract has been put an end to. Now I am clearly of opinion, that though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and time will then be considered by the court as having become of the essence of the contract: and in case the party make default in doing what is right and just on his part, within the time so fixed, it will be a reason why the court will

(a) 2 S. & B. 29. (b) 1 R. & M. 236. (c) *Walker v. Jeffreys*, 1 Hare 348. (d) 2 Beav. 187. (e) 6 Beav. 126; *Benson v. Lamb*, 9 Beav. 505.

not afterwards interfere in his favour to compel the execution of the contract." 1851.

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While time may be thus rendered material by either party, it is equally clear that its strict observance may be waived, either by express arrangement or by conduct. The most substantial and important right, that to a good title, may be waived by the conduct of the parties, much more the right to require the strict observance of time in performance of the contract. This proposition, indeed, seems so well founded in reason, that authority is hardly required for its support; but the law upon the subject has been very distinctly stated by Sir *James Wigram* on a recent occasion (a). He says: "I agree with the defendants, that each breach on the part of the plaintiff, in the non-payment of money, was a new breach of the agreement; and that time, being of the essence of the contract, each breach gave the defendants a right to rescind the contract, but that right should have been asserted the moment the breach occurred. The defendants were not at liberty to treat the agreement as still subsisting, and to take the benefit of it at the expense of the plaintiff, if they meant to insist that it was at an end. They were at liberty to rescind it, but were not imperatively bound to do so. There is no stronger reason for holding that the forfeiture of a lease is waived by the acceptance of rent subsequently accruing, than there is in this case for holding that the acceptance of an instalment of purchase money (which was not due unless the agreement was to be continued) is a waiver of the right to rescind the agreement. The defendants had no right to accept the money but upon the principle that the agreement was still subsisting." Judgment.

If then time, when expressly made of the essence of the contract, may be waived, it would seem to follow, *a fortiori*, that the right to object to delay as a

(a) *Hunter v. Daniel*, 4 Hare, 433.

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ground for resisting specific performance may also be waived by the conduct of the parties in treating the contract as subsisting notwithstanding such neglect. In *King v. Wilson*, to which I have before referred, a notice had been given, which, in the opinion of the Master of the Rolls, fixed too short a period for the completion of the contract. In discussing that point he went on to remark: "Now I must say, that under the circumstances, this was rather too short a time—it was not reasonable to require that everything should be done within a week. However that might be, I think that under the circumstances of this case the contract was not put an end to, for we find these gentlemen (meaning, I dare say, that the correspondence should be continued without any prejudice,) afterwards proceeding in the matter, and considering whether a satisfactory indemnity could not be had; in which event, it is not disputed, the contract might be completed without regard to the letter fixing the time within which it was to be done; so that there was something which might have been done, after the expiration of the time fixed, by means of which the contract would have been completed. It appears to me, under the circumstances, that the contract is not put an end to."

And in *Southcomb v. Bishop of Exeter*, where a notice had been given, and where negotiation had been continued, but under protest, after the time fixed by such notice for the completion of the contract, the Vice Chancellor, although he considered the notice reasonable and the benefit of it preserved by the protest, still determined that the time which elapsed after the period fixed and while the negotiations were pending could not, as a mere question of delay, affect the plaintiff's right. He says: "I cannot, however, think that the vendors were in any default by not having filed their bill whilst that treaty, however modified by the protest of the purchaser, continued; and I therefore regard the treaty between the 20th

August, 1841, and the 17th of January, 1842, as material only for the purpose of shewing what was the position of the parties on the latter of those days." Now, although in affirming that the right to specific performance of a contract may be determined by notice, I do not mean to be understood as asserting the truth of the converse of that proposition—namely, that mere delay, where nothing has been done under the contract, may not be an effectual bar, irrespective of such notice; still I think that the authorities which I have cited warrant this proposition that those who deal with a contract themselves, or acquiesce in others dealing with it, as a subsisting engagement, cannot be afterwards heard to say, that the right to specific performance has been forfeited by delay in which they have so acquiesced. And I think I may add, although that point does not now arise, and I do not mean to lay down a rule, still, considering the peculiar position of real estate in this province, and the peculiar habit of dealing with contracts in relation to it which has sprung up here, I think I may venture to add, that were such a notice as I have alluded to, held to be necessary to the determination of the plaintiff's right to specific performance in all doubtful cases, such a rule, if properly deducible from such circumstances, would be found to place the rights of parties upon a footing much more satisfactory than if left to depend upon the discretion of the judge in each case.

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In *Adams v. Weares* (a) Lord *ThurLOW* said: "I am not very anxious to discuss the point, what bargains the court will execute or not; but when the court has laid it down, as an article of the equity which men shall obtain here, and which they cannot obtain at law, that instead of damages they shall have a specific performance, and that every agreement must be performed, unless something at the time of

(a) 1 B. C. C. 567.

1851. making the bargain or something done since, is to amount to a waiver of it, at the time of carrying it into execution; if you do not confine yourself within that limit, there are no bounds whatsoever, for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable, which expressions, unless they are properly applied, mean little or nothing." Although this language may not be reconcileable with everything to be found elsewhere laid down upon this subject, still, as the opinion of a great judge, it is highly significant. And if the importance of proceeding according to fixed rules be so apparent, when the question is, whether the agreement in substance be such as should be specifically performed, the propriety of determining the collateral points of which we have been speaking, upon some rule more fixed than the discretion of the judge, can hardly be considered doubtful.

Judgment.

In applying those principles to the present case, the rules to be extracted from English authorities may be to some extent modified; but that modification will be found to result from the peculiar circumstances of the case, and not from the introduction of any new doctrine. It has not been necessary to lay down any new rule. Our judgment will be found, I think, to proceed upon principles clearly deducible from decided cases.

First, then, as to the delay. The plaintiff was admitted into possession of the premises in this cause on the 31st of January, 1842, under a contract for the purchase of the fee simple. The property in question was altogether forest land, and the beneficial occupation consequently involved a very considerable outlay—an outlay in this case, as shown by the evidence, more than three times greater than the contract price of the land. The plaintiff was known to be without

capital, and was let into possession for the avowed purpose of drawing from the soil, after such outlay, the means of paying the stipulated price. Between the period of the plaintiff's entry and the re-sale to *Campbell* he had expended, according to the testimony, a sum considerably exceeding his proportion of the purchase money, (his improvements are valued, I think at 50*l.*), and the defendant *Boulton* was confessedly cognizant of the continued possession and expenditure; but up to the 15th of January, 1845, the date of the re-sale, the plaintiff had neglected to pay any further portion of the purchase money; and the question now is, whether it was competent to the defendant under such circumstances, to have treated the contract as at an end, and re-sold to *Campbell*, in the way that has been mentioned, without having previously adopted any step for the purpose of its determination. In my opinion that course was not open to him. It would indeed have been competent to the defendant to have required the plaintiff, at any moment after default, to have fulfilled his agreement within a reasonable time; and had the plaintiff failed to comply with such reasonable requirement, the contract might have been treated as at an end; but I know of no principle upon which the defendant, having suffered the plaintiff to treat the contract as still subsisting, by continued occupation and expenditure, up to the period of re-sale, can be heard now to say, that the right to specific performance had been forfeited by a delay in which he had himself acquiesced. The receipt of a portion of the purchase money, after default, would have been a waiver of whatever delay might have arisen. Can the defendant, having suffered the plaintiff to treat the property as still bound by the contract—having acquiesced in his continued occupation and expenditure—treat the contract as determined at any point of time he may think proper arbitrarily to adopt? Reason and authority seem to me equally to negative the existence of

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Taylor.

Judgment.

any such right (a). Apart from any consideration of the effect to be attributed to the habit of dealing with contracts of this kind, which has almost universally prevailed in this province—which may perhaps be found of great weight when the question comes to be considered (b)—and considering the case strictly upon the principles to be deduced from English decisions, I am quite unable to draw the conclusion contended for by the learned counsel for the defendants; but considered in connection with the peculiar circumstances to which I have adverted, the proposition contended for would tend to the most alarming consequences. The present defence seems to me to fail, both in reason and upon authority; but had that been less apparent, I should have found great difficulty in adopting a conclusion which would have the effect of shaking the titles of a large proportion of the property throughout the province. To refuse specific performance on the ground of delay under such circumstances, would be to negative the existence of an equitable title in innumerable cases, and thus to deprive of their property multitudes of persons, who, notwithstanding the delay complained of, had been suffered to continue in possession, and had been encouraged, or at all events permitted, to incur considerable expense, on the faith that those contracts were still subsisting. Such, indeed, would be the result of giving effect to the strictly *legal* rights of parties. But this court was established for the very purpose of obviating such palpable injustice.

It has been argued, however, that in this case Mr. Boulton is shown to have repeatedly required the plaintiff to complete his engagement under this contract. The evidence upon this point is very much

(a) *Hunter v. Daniel*, 4 Hare, 433; *Nicholson v. Hooper*, 4 N. & C. 179; *Shine v. Gough*, 1 Ball and B. 444; *Lord Cardon v. Lewis*, 1 Y. & Coll. (E.) 427. (b.) *Ogilvie v. Foljambe*, 3 Mer. 64; *Lennox & Napper*, 2 S. & L. 631; 19 & 20 Geo. III, c. 30; *Jackson & Saunders*, 1 S. & L. 443.

wanting in that clearness and precision which might have been, perhaps, reasonably expected; but, assuming it to have been so—assuming the applications, of which Mr. *Boulton* has spoken in his evidence, to have reached the plaintiff—that circumstances would seem rather calculated to strengthen the plaintiff's case. The plaintiff is no longer driven to rely upon mere acquiescence. Those applications obviously proceed upon the contract remaining a subsisting engagement. Upon that hypothesis alone, had the defendant a right to demand any further payment. It was competent to him either to have determined the contract, or to have waived the default and treated it as a subsisting engagement. He chose the latter alternative, and has therefore effectually precluded himself from relying now upon the former.

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Upon these grounds, I am of opinion, that, up to the time of the re-sale, nothing had occurred to deprive the plaintiff of his right to specific performance. Judgment. Was there, then, anything in that re-sale, or in the subsequent occurrences, which should properly have that effect? I am of opinion that there was not. It may perhaps be questioned whether the motives which actuated that purchase, and the circumstances under which it was carried out, are such as to claim any very favourable consideration in this court. But, without relying upon that consideration, if the contract were at the time of the re-sale subsisting, and if that re-sale were consequently wrongful, *Campbell* cannot stand, in consequence of it, in any other position than Miss *Taylor* had been before it. It would have been incumbent upon him, therefore, to have taken such steps as Miss *Taylor* might have adopted for the purpose of either determining the contract, or compelling the plaintiff to fulfil his engagements under it within a reasonable time. But, so far from repudiating the contract, the defendant *Campbell*, not only in his purchase from *Hinds*, which immediately

1851. preceded the sale from *Boulton* to himself, but in his subsequent interview with the plaintiff, seems to me to have admitted its continued existence. He suffered the plaintiff to continue in possession. His first step is an action of ejectment, and this bill was filed in sufficient time to restrain that proceeding.

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Judgment.

With respect to the waste which is said to have been committed, the abstract principle contended for by the learned counsel for the defendants is unquestionably supported by considerable authority; but what room is there for the application of that doctrine under the circumstances of this case? The plaintiff was admitted into possession, with a view, I presume, to a beneficial occupation: but the land was entirely covered with timber. Beneficial occupation necessarily involved the felling of timber—the commission of what would be, strictly speaking, waste. Has the plaintiff forfeited his right to specific performance by acts which both parties must, from the very nature of the thing, have contemplated, and which were at all events, sanctioned in this particular case by express provision? Mr. *Boulton*, in his evidence, admits that he had authorised the plaintiff to fell the timber on the property. He avows that he depended exclusively upon the successful application of the plaintiff's labour to the land, and, I presume, to the timber upon the land also, as furnishing him with the means of meeting his engagements. Would not the application of such a doctrine to the present case outrage alike reason and justice? Any improper proceeding under such license would have warranted an application here to restrain such abuse. But to hold the plaintiff's right to specific performance barred by the conduct attributed to him, under the circumstances disclosed in evidence, would be to lay down a rule which, while failing to protect the vendor, would be capable of being used for purposes of the grossest oppression.

Upon the whole case, my opinion is in favour of 1851.
the plaintiff. I have not concealed from myself the
great importance of the principles involved; but upon
the most careful consideration of the subject, in some
degree, I hope, proportionate to the great importance
and extensive application of the principles involved,
I have formed a very clear opinion, that this agree-
ment ought to be specifically performed; but, under
all the circumstances, the decree must be without
costs.

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Judgment.

IN REVIEW.

RE BROWN, A BANKRUPT.

Where a creditor held a security on lands of his debtor for a specific Dec. 10, 18 0
amount, and afterwards, in rendering his accounts to his debtor, car- and
ried the amount of such mortgage into the general account, and hav- Feb. 21, 1851
ing received from the debtor, and on his account, several sums of
money, which, as the creditor alleged, were to be credited on certain
other dealings between the parties, but instead thereof they were
carried to the debtor's credit generally; *Held*, That notwithstanding
any previous agreement that might have existed between the parties,
that this was such an expression of the final determination of the
parties, as precluded any inference from their previous conduct, and
that therefore the receipts must be applied, in the first instance, to
the reduction of the sum secured by the mortgage security.

The facts of the case, and the views of the counsel
for the parties, are so fully set forth in the judgment Statement.
of the court as to render any statement of them
unnecessary.

Mr. Crooks and Mr. Turner for the petitioners Argumen.
cited *Heywood v. Lomax* (a); *The Bank of Scotland*
v. Christie (b); *Pemberton v. Oakes* (c).

Mr. Vankoughnet, Q. C., for an incumbrancer.

Mr. A. McLean and Mr. E. C. Jones for Messrs.
H. & S. Jones, the mortgagees.

(a) 1 Vern. 24. (b) 8 Cl. & F. 214. (c) 4 Russ. 145.

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Re Brown.

THE CHANCELLOR.—Nothing can be conceived more unsatisfactory than the proceedings upon this petition. The irregularity which had crept into the conduct of the cause in the court below, and the eventual impossibility of ascertaining the evidence upon which the learned commissioner had proceeded, consequent upon that irregularity, have produced much delay and expense to the parties; and now that we are about to pronounce an order upon this petition, we find the facts disclosed here by no means sufficient to enable us to dispose finally of the matter. Under these circumstances, the learned counsel for the respondents contend that the petition ought to be dismissed, inasmuch as the evidence does not enable us to conclude distinctly that the commissioner has arrived at an erroneous result; but, keeping in view the whole proceedings in this court, we are of opinion that we ought not to adopt the course suggested.

Judgment.

It appears that in the year 1847 the bankrupt had become indebted to the respondents, Messrs. *H. & S. Jones*, in the course of their business, in the sum of 2414*l.* 18*s.* 11*d.*, and, on the 14th of September in that year, he executed an indenture, by which certain real estate of the bankrupt was conveyed to the Messrs. *Jones*, in fee simple, by way of mortgage, to secure the re-payment of 2000*l.* on or before the 1st day of January, 1849. We have no evidence of the negotiation which preceded this transaction. The deeds states the consideration to have been 2000*l.* then paid, and contains a covenant on the part of the bankrupt for the re-payment of that sum, as just mentioned; but it is clear that no money was in fact paid, the 2000*l.* was confessedly a portion of the balance (2414*l.* 18*s.* 11*d.*) then due from the bankrupt to the Messrs. *Jones*. Subsequent to the execution of this instrument, the dealings between these parties continued until the bankruptcy of *Brown*, and in the course of those dealings further advances on the part

of the Messrs. *Jones*, and payments by the bankrupt, 1851.
 were made; and the sole question between the
 parties, as well in the court below as here, (apart
 from some formal objections to which I shall presently
 advert) was, whether the learned commissioner had
 proceeded according to settled principles in deter-
 mining the question, whether any and what amount
 remained due upon the foot of the security of the 14th
 February, 1847. The learned counsel for the peti-
 tioners contended, that inasmuch as the bankrupt had,
 after the execution of the deed of September, 1847
 paid various sums, sufficient to discharge the whole
 debt then due, without special appropriation, and
 inasmuch as the creditors had not preserved the old
 debt distinct from the new advances, but had amal-
 gamated the whole in one general amount, to which
 no objection had been made by the debtor, the learned
 commissioner ought to have applied the bankrupt's
 payments in discharge of his liabilities, in the order
 in which they had accrued; upon which principle of
 taking the account the result would have been, as
 was said, that nothing remained due on foot of
 the mortgage. The learned counsel for the respon-
 dents, on the other hand, contended that the circum-
 stances of this case shewed a special appropriation
 of the new payments to the new advances, and that
 the finding of the commissioner was therefore correct.
 To dismiss the petition now, on the ground that the
 evidence is insufficient to prove conclusively that the
 commissioner did proceed upon the erroneous prin-
 ciple complained against, would be, in our opinion,
 manifestly improper. The whole argument proceeded
 upon the hypothesis, that he had acted upon a prin-
 ciple said to be erroneous. That he did so proceed
 is not now denied. Had the fact been otherwise,
 that would have been the proper answer to the
 petition. There would have been no room for the
 discussion that then took place, which, in the absence
 of any denial of the fact, must be considered now to

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1851. have proceeded upon an implied admission of its truth.

Re Brown.

But, apart from these considerations, which yet seem to us conclusive, we are of opinion that enough has been disclosed to prove to us satisfactorily that the ends of justice will be best answered by referring the matter again to the court below, together with our opinion upon the question brought before us.

Before disposing of the main question, it will be proper to consider the preliminary objections urged by the respondents. It was contended, first, that the court below had no jurisdiction to entertain any question in relation to this mortgage, and, as a necessary consequence, that this court has now no jurisdiction.

Judgment Without entering upon the general question, it seems to us too obvious for argument that the respondents, having submitted to the jurisdiction of the court below, and claiming in fact under the judgment of that court, cannot be heard now to deny the jurisdiction of this court to review that judgment.

It was then urged that the petition was informal, in not having set forth the grounds of the commissioner's judgment, and the reasons upon which the petitioner conceived that judgment to be erroneous. No settled practice has grown up in this court; neither do the English decisions furnish any very satisfactory principle. This petition is certainly inartificial. The mode of pleading suggested would have been at once more convenient and correct; and had this petition required the support of evidence adduced under it—had the question been, whether the allegations warrant the proof—some of the cases cited would have had a material bearing (a) But this is a mere petition of appeal. No evidence is to be

(a) *Ex parte Paramore*, 1 D. 279.

adduced under it. It proceeds upon evidence taken ^{1851.}
 in the court below. The only consequence of sus- ^{Re Brown.}
 taining the objection urged would be an order that
 the petition should stand over for amendment (a); an
 order which would possibly have been proper had
 the respondents been misled; although even that
 would not seem quite settled (b). Here, however, the
 parties have been in no degree misled. The point to
 be argued was perfectly understood, and it seems to
 us, therefore, that the objection must fail.

Upon the main question, we are of opinion that the
 principle upon which the learned commissioner is
 said to have proceeded is erroneous. Laying out of
 view, for a moment, the security of the 14th Septem-
 ber, 1847, and the other circumstances to which I am
 about to advert, it is not to be doubted that this ac-
 count should have been taken, irrespective of those
 circumstances, upon the principles laid down by Sir
William Grant in *Clayton's* case (c). Not only are ^{Judgment}
 the rules there propounded by that very learned judge
 based upon reasoning entirely satisfactory, but they
 have been since applied under almost every variety
 of circumstance. But, it is said that this is dis-
 tinguishable from *Clayton's* case on two grounds—
 first, in consequence of the mortgage security, which
 having, as is said, merged the simple contract debt
 to that extent, must consequently have had the effect
 of precluding the *Jones's* from appropriating the new
 payments in discharge of a debt not then due; and
 it is argued, secondly, that the evidence in this case
 shews an appropriation of the new payments to the
 new advances.

Had this case depended upon the effect of the
 indenture of mortgage, it would have been necessary
 for us to have considered the applicability of the doc-

(a) *Ex parte* Worth, 2 D. & C. 4; *Ex parte* Baker, Mon. & C. 156.
 (b) *Ex parte* Mudie, 2 Mon. D. & D. 490. (c) 1 Mer. 580.

1851. *trine in Twopenny v. Young (a)*, and other cases of that class; and also, whether that doctrine has not been limited, to some extent by more recent decisions (*b*). And the case would not, in our opinion, have been free from embarrassment had we been called upon to determine whether (assuming the mortgage security not to have operated as a merger *pro tanto* of the simple contract debt) the law would not have appropriated the new payments in the way contended for by the respondents, in the absence of any special appropriation (*c*); but the facts disclosed here appear to us to preclude both these questions. Beyond all doubt, these parties might have separated the mortgage debt from their general account, and in that way the security might have been kept on foot for the benefit of the Messrs. Jones; but it was no less plainly competent to them to have amalgamated both debts in one general account, and thus subjected themselves to the rules by which the application of indefinite payments is to be governed. Now, so far from having separated the mortgage debt from the general dealings, the next account delivered by the Messrs. Jones commences with the balance of 241*l.* 18*s.* 11*d.*, (including of course the mortgage debt), and, after debiting the bankrupt with all subsequent advances, credits the after-payments, and brings down upon the whole transaction a balance of 1808*l.* 17*s.* 2*d.* Independently therefore of the fact of a mortgage having been executed, it is not to be doubted that the effect of this dealing would have been to extinguish the old debt, to the extent of the new payments. Then, is that fact sufficient to distinguish the case? We think not. The same circumstance existed in many of the authorities subsequent to *Clayton's* case. In *Bodenham v. Purchas (d)*, *Pemberton v. Oakes (e)*, and *Simpson v. Ingham (f)*, the attempt was, as

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(a) 3 B. & C. 208. (b) *Emes v. Widdowson*, 4 C. & P. 151; *Aston v. Yates*, 4 Q. B. 182. (c) *Heyward v. Lomax*, 1 Ver. 24. *Meggott v. Mills*, 1 Ld. Ray, 286. (d) 2 B. & Al. 39. (e) 4 Russ. 154. (f) 2 B. & C. 65.

here, to escape from ultimate loss by applying subsequent payments to new advances, thus keeping alive the collateral security; but in all, the rule laid down in *Clayton's* case was applied. And in *The Bank of Scotland v. Christie* (a) the circumstances still more closely resemble the present case.

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It is argued, however, that here the advances were made upon the production of particular warehouse receipts, and this mode of dealing is relied upon as in effect amounting to an appropriation of the new payments to the new advances. And it is said either as strengthening that view of the case, or as affording an independent argument, that such an appropriation was expressly made by special agreement in the present case. We are of opinion that the facts disclosed furnish an answer to both these arguments, as also to that based upon the mortgage security, to which I have just referred. But had those arguments been open to the respondents upon the facts, I would have thought the peculiar mode of dealing relied upon insufficient to have withdrawn the case from the rule propounded by Sir *William Grant*. Circumstances similar in kind are to be found in several of the cases cited. But the evidence of an agreement to appropriate the payments in the way contended for is, so far as it has been laid before us, extremely unsatisfactory. The bankrupt indeed says, "That all the acceptances after the execution of the mortgage were on account of flour shipped, and given upon the production of warehouse receipts; that the proceeds were to be applied in payment of the acceptances, and the surplus, if any, in liquidation of the mortgage." But in the next sentence he says, "That the examinant does not recollect anything having been expressly said as to the mode in which the proceeds of the produce shipped by the examinant to the said *H. & S. Jones* were to be applied." Reading

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(a) 8 C. & F. 226.

1851. *Re Brown.* these sentences in connexion, so far from establishing, they seem to us to negative the agreement asserted; but whatever be the true construction of that deposition, we are of opinion, that the admitted facts afford an unanswerable refutation of both arguments; because, whatever might have been the effect of the peculiar dealing of these parties, as well in relation to the security itself as also to the manner of the subsequent advances and whatever may have been their agreement, that which they have done in relation to the matter excludes, in our opinion, all such arguments. When they came to act—to do that which was in effect the appropriation—they proceeded neither upon the intention to make a special appropriation, supposed to be deducible from their peculiar mode of dealing, nor yet upon the express agreement said to have been entered into between them; but on the contrary, the *Messrs. Jones* furnish an account in which the whole balance due on the 14th of September, 1847, including the sum secured by mortgage, is amalgamated with subsequent dealings, and the subsequent receipts are credited without any express appropriation, and a general balance is struck; and the bankrupt, on the other hand, retains that account without objection. Now that proceeding was, in our opinion, an effectual appropriation of all the payments embraced in it according to the rules prescribed by law in relation to indefinite payments. It was the expression of the final determination of the parties, which necessarily precludes all inference from the antecedent conduct or understanding of the parties—an actual appropriation, from which the parties are not now at liberty to withdraw (a).

Judgment.

As it would have been competent to the *Messrs. Jones* to have separated the mortgage transaction from the rest of their dealings, in the first instance, and to have thereby kept the mortgage on foot as a

a) *Simpson v Ingham*, 2 B. & C. 65.

subsisting security so it would have been competent to them, we think, to have adopted that course at any subsequent period, so long as any sum remained due on foot of it. Whether they did in fact so deal with the matter after the month of April, 1848, the evidence does not enable us to judge. That remains to be determined by the commissioner. But, up to that date, we are of opinion that all payments made by the bankrupt were in effect payments upon the old balance, and should have been so treated in taking the account; and if the subsequent dealings have been of the same character, the same result must of course follow.

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Re Brown.

As to the costs of this petition, the general rule is that costs are not given to a party on a petition against the judgment of the commissioner (a), and we see no reason to except this case from the general rule.

With respect to the expense of retaking the evidence, we think that must be disposed of in the same way. The affidavits are, to some extent, conflicting. The certificate with which the learned judge has furnished us, by no means solves the difficulty. It is evident to us that the parties did not mean to assent to anything which would have deprived them of the right of appeal. Indeed, that is admitted to have been so by the learned counsel for the respondents. But to have consented that the commissioner should decide the case without preserving any record of the evidence upon which he proceeded, would have necessarily precluded an appeal. We are of opinion, therefore, that such was not the intention of the parties; and, being of that opinion, we know of no principle upon which we could charge the petitioners with costs which have unfortunately resulted from an irregularity on the part of the learned commissioner, not attributable, as it seems to us, to any misconduct on the part of the petitioners, but to a general misunderstanding of all parties concerned.

Judgment.

(a) Ex parte Millington, 3 D. & C. 308.

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GILLESPIE V. GROVER.

Practice—Amendment.

Where, after the time of amending as of course, an order is obtained to amend by adding a party "with apt words to charge him or otherwise, as plaintiff shall be advised," the plaintiff is not at liberty to make any amendment whatever, except such as is required for the purpose of introducing the additional party.

Statement

This was a motion made to expunge certain amendments, as being unwarranted by the order obtained, by consent, in the cause. It appeared, that besides making the additional party to the suit, the plaintiff had amended his bill, by stating a totally different lot of land from that mentioned in the original bill, and

Argument

Mr. *Turner*, for one of the defendants, now moved to expunge all the amendments made under such order, other than those necessary for the addition of the new party.

Mr. *McDonald* contra.

Judgment

ESTEN, V. C.*—This was a motion to expunge amendments, as not being authorised by the order under which they were made. The plaintiffs had twice amended their bill before replication—the first time under an order to amend by making two of the defendants co-plaintiffs, and as they should be advised. Both amendments were by consent. On the 7th of November last, after replication, a third order to amend was granted by consent, and it gave permission to amend, by making a certain individual a party, defendant to the bill, "with apt words to charge him or otherwise, as they (the plaintiffs) shall be advised." It appears that several applications were made to Mr. *Turner*, the solicitor for the defendant *Robertson*, who makes this application, and other defendants, to consent to this amendment, both by Mr. *McDonald*, the defendant's solicitor, and

* The Chancellor was concerned in this case while at the bar.

his clerk Mr. *Ritter*; that upon these occasions no amendment was mentioned, but that of adding the proposed new party; that no other amendment was specified or referred to in the body of the petition to amend, the additional words which are relied on being merely introduced into the prayer; and that Mr. *Turner's* attention never was called to the fact of any other amendment than the addition of the proposed new party being in the contemplation of the plaintiff's solicitor. Mr. *Turner* states positively in his affidavit that it never occurred to him that any other amendment was intended, and that he never intended to consent to any other. Mr. *Ritter*, who makes an affidavit in opposition to the motion, does not say that it was ever mentioned to Mr. *Turner* that any other amendment than the one specified was contemplated, or that his consent was ever asked to any other, but merely that the petition was delivered to and remained some days with Mr. *Turner*; that his (Mr. *Ritter's*) own application for Mr. *Turner's* consent had reference to the petition, and that no attempt had been made to mislead Mr. *Turner* in reference to the contents of the petition. It would, no doubt, be very dangerous to allow a party who had consented to an amendment, afterwards to get rid of it, by saying that he had not intended to consent to it; but if the circumstances of this case, as they appear upon a comparison of the affidavits, are attentively considered, it will appear very plainly that Mr. *Turner* not only fell into error very naturally, but was (unintentionally no doubt) drawn into it by the plaintiffs themselves, when he appended his consent to this petition, if we suppose that it and the order issued in pursuance of it pointed to any more extensive amendment than the introduction of the proposed new party. Under these circumstances, it would have been impossible to allow this order or the amendments made under it to stand, if an application had been made to discharge the order, as well

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as to expunge the amendments; and the difficulty which I felt upon the argument of the motion was, that as the terms of the order seemed to justify the amendment, it was necessary to discharge the order itself, for which purpose no application had been made. Upon reflection, however, I think that the present order does not warrant any other amendment than the introduction of the new party. An order to amend, obtained after replication by consent, and specifying a particular amendment with the addition of some loose general words, cannot, I think, receive a construction which would warrant any amendment whatever, although of the most extensive description, and would make the order equivalent to an order to amend generally, as the plaintiff's might be advised. Under such circumstances, the general words following the description of the proposed amendment must be deemed to have reference to that amendment, and to be intended to give as fully as possible the power of effecting it. Under these circumstances, I think that the amendments, so far as they exceed what is required for the purpose of introducing the additional party, must be expunged with costs.

Judgment.

Order.

That all amendments made in the plaintiff's bill, under an order of this court bearing date, &c., other than those necessary for making *James Foley*, the uncle, a party-defendant thereto, with apt words to charge him, be expunged, with costs to be paid, &c.

ANONYMOUS.

Practice—53rd order.

The 53rd general order of May, 1850, does not apply to a foreign commission for taking depositions.

Mr. *Turner* stated that the plaintiff was about to issue a foreign commission for the purpose of taking the depositions of witnesses; but that owing to the general language of the 53rd of the orders of May, 1850, which was that "No written interrogatories for the examination of either witnesses or parties, either

before or after decree, shall henceforward be filed, 1850. except by direction of the court," the solicitor felt ^{Anonymous} that he was not at liberty to file interrogatories, and it was impossible to get any one to attend the commissioners who would be competent to conduct a *viva voce* examination.

Per Cur.—We do not think that the 53d order Judgment. applies to foreign commissions. The examination in such cases will proceed, as formerly, upon interrogatories.

MITCHELL V. CROOKS.

Practice—Decree.

The court will not set aside a decree which has been regularly obtained upon precept under the orders of this court, except upon an affidavit shewing that the defendant will be damaged by the decree being permitted to stand against him.

In this case, the plaintiffs, on the day following Statement. that on which the answer of the defendant was due, had obtained a decree upon precept, under the mortgage orders of 1845.

Mr. *Turner*, for the defendant, now moved to set Argument. aside the decree so obtained. The mortgage, though stated in the bill as one of an ordinary character, was in fact not so, it having been in reality given as a collateral security for the debt of a third person, and who, he submitted, ought to have been made a party to the suit.

Mr. *McDonald* contra. The only question really is as to parties, and the plaintiffs undertake to give the defendant all the advantage which he could derive had the principal debtor been made a party.

THE CHANCELLOR.—Some analogy may be sup- Judgment. posed to exist between the practice in such a case in this court, and a case at common law where judg-

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ment has been obtained by default; but judgment so obtained is never set aside, except upon an affidavit of merits—that is, the party moving shews by affidavit that he will be in a better situation by having the judgment set aside, than if it is allowed to stand. Now, the tendency of the late as well as of the previous orders, when the only question between the parties is the state of the account, is to refer all suits at once; and such being the case, we do not feel that we should be acting according to the spirit of those orders, were we to permit a defendant, as a matter of course, to come in and set aside a decree obtained in a regular manner upon *precipe*: we think that at least he should be required to shew, upon affidavit, that he will be damnified in some measure by the decree being permitted to stand against him.

NOTE.—In the affidavit filed by the defendant on the above motion, it was alleged that there had been some agreement entered into, to the effect that the defendant was to have time allowed to put in his answer. This was denied by the other side; and the court afterwards ordered the matter to stand over on that point, in order that affidavits of the facts might be put in.

GWYNNE V. McNAB.

Practice—Dismissing Bill.

The court will not, on motion, dismiss a bill “without prejudice to the plaintiff’s filing another bill.”

Statement.

Mr. *Gwynne*, for plaintiff, moved to dismiss on payment of costs, and asked that the order of dismissal might be drawn up “without prejudice to the plaintiff’s filing another bill;” but

Judgment.

Per Cur.—The order must be drawn up in the usual form, without any special reservations as to the plaintiff’s right to file another bill. The plaintiff must take his chance as to the effect such an order will have upon his rights. If the practice authorises him, under the circumstances, to institute a fresh suit, he can of course do so; but, however that may be, we do not feel at liberty to make any special order in the matter

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Dec. 13, 1850
and
Feb. 4, 1851.

O'LONE V. O'LONE.

Partnership—Practice—Further directions—Costs.

Where, by articles of partnership between M. & L., it was recited, in substance, that the parties had for some years been equally interested as partners in trade, and all profits and losses thereby; and that all their then or after-acquired property, and all profits, should be divided between them equally; and that at the settlement or dissolution of the partnership, M. should have 150*l.* over and above one-half of all the money and property which they might possess at the time of such settlement; and it was then provided, *inter alia*, that all profits and losses should be borne equally, "except, as has already been done, that M. should receive 150*l.* more than L." *Held*, that the 150*l.* should be deducted from the gross amount of property and money, and not from L.'s share merely.

Where the defendant was, at the dissolution of a partnership, to receive 150*l.* more than the plaintiff, and it appeared that a settlement of the accounts had been delayed by the misconduct of the defendant; *held*, that he was not entitled to interest on the 150*l.* from the time of the dissolution.

Under a decree for taking partnership accounts, in which the Master was directed to state special circumstances and make all just allowances, the Master reported that in taking the accounts, he had, amongst other things, charged one of the partners for his board, &c., with the other, after the dissolution of the partnership; *held* wrong, and that the objection could be taken on the hearing on further directions.

Where one of two partners denied the existence of a partnership, and a bill was in consequence filed against him, and by the evidence taken in the cause the partnership was established, the court gave the plaintiff the costs up to the hearing, also the costs of a consent reference as to the fact of partnership, and beyond that refused costs to either party.

The bill in this case was filed against *Michael O'Loone*, and set forth, amongst other things, that on the 6th day of June, 1828, the plaintiff and *Michael O'Loone* entered into an agreement respecting a partnership which had existed between them previously to that time; and that thereupon certain articles of agreement were duly executed by plaintiff and *Michael*, bearing date that day; wherein, after reciting that the said *Michael O'Loone* and *Lawrence O'Loone* had for several years been equally concerned together as partners or joint-traders in merchandise of various kinds, and losses thereby; and had agreed that all book accounts, notes of hand, stock, lands or houses which they then possessed or might possess until a dissolution of the partnership, and all profits thereof or accruing therefrom, should be equally divided between the said partners; that they had agreed that at the time of settlement or

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Statement.

dissolution of co-partnership, the said *Michael* (having advanced more stock than his partner) was to have 150*l.* over and above one-half of all moneys and property. It was witnessed that in consideration of the trust and confidence which the parties had and reposed in each other, and it was thereby declared, covenanted and agreed by and between the said parties, for themselves, their executors, &c., that the said parties were and would become and continue partners and joint-traders as aforesaid, until the partnership was dissolved by mutual consent, or by the death of one of the parties; and it was agreed that the charges and losses, and all profits arising by and on account of the said joint trade, should be equally paid, received and borne by and between the said parties, "excepting, as has already been done, that the said *Michael O'Lone* shall receive 150*l.* more than the said *Lawrence O'Lone*, for the consideration already stated;" that the defendant became extremely lavish in lending the funds of the partnership, and, without the privity or consent of plaintiff, had sold property, of which he refused to give plaintiff any account, and insisted that plaintiff was not entitled to such account. In consequence whereof it was agreed between plaintiff and defendant that the dissolution of the partnership and settlement of the accounts thereof, should be referred to arbitration.

The prayer of the bill was, that the co-partnership business might be dissolved by decree of this court, for an account and a receiver.

Michael O'Lone appeared and put in his answer, whereby he denied the existence of the partnership as set up by the bill; and plaintiff having put the cause at issue, and publication having passed, the cause came on to be heard, when it was by consent of counsel decreed that it should be referred to the Master, to enquire of the truth of the several allega-

tions contained in the pleadings, and also to enquire when the partnership, if any, between plaintiff and defendant commenced, and for what period it subsisted, when determined, the terms thereof, and of the dissolution thereof; and if the Master should find that any such partnership did exist, then, by and with the like consent, it was ordered that an account of all the partnership dealings, &c., should be taken by the Master, upon the footing of all agreements respecting the same and the dissolution; and in making such enquiries the Master was to state any special circumstances to the court, and by the like consent, the costs of the suit and further directions were reserved till after the Master's report.

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O'Lone
v.
O'Lone.

In pursuance of this decree, plaintiff and *Michael* each brought into the Master's office states of facts as to the existence of the partnership; and divers witnesses were examined upon the same, and the Master, having been satisfied of the truth of the allegations of the plaintiff, proceeded to take the accounts of the partnership; and after some progress had been made before the Master in taking such accounts, it was agreed between the parties to leave all matters in difference between them to arbitration, and an order to that effect was made by consent in the cause, which was renewed, or the time thereby limited enlarged by several subsequent orders; but before any award was made, *Michael* died without lawful issue, leaving *Bernard O'Lone* his heir, having first made his will, devising the property amongst the defendants to the revived suit, of whom *Bernard* was one.

Statement.

The suit was then revived against the executors and devisees of *Michael*, and afterwards, and in the year 1849, the Master made his report, and thereby, amongst other things, found that some years before the 6th day of June, 1828, a partnership had existed between the plaintiff and *Michael O'Lone*,

1850. and that on that day the articles of co-partnership set forth in the bill were entered into between the plaintiff and *Michael*, and that the partnership continued until the year 1839, after which period they carried on no joint business as partners or otherwise; that after the dissolution of partnership *Michael* boarded and lodged with the plaintiff for the period of two years and a half; that the Master had charged against *Michael* his board and lodging with the plaintiff subsequent to the dissolution of partnership; that *Michael* having been entitled to 150*l.* more than plaintiff upon such dissolution, he had charged the partnership therewith, and in taking the accounts between the parties had charged the plaintiff with one-half thereof (75*l.*); and the Master certified, at the instance of the solicitor for the defendants, that he had not charged the plaintiff with interest on the 75*l.* so charged against him.

Statement.

No exceptions were filed to this report, and it having been duly confirmed and the cause set down for further directions and costs, the same now came on to be heard accordingly.

Mr. *Mowat* for the plaintiff.

Mr. *Turner* and Mr. *Roaf* for the several defendants.

On the argument several questions arose.

Argument.

1. Whether the Master had rightly construed the covenant as to the 150*l.*; the defendants contending that *Michael* was entitled to 150*l.* more than half of the whole partnership assets, which would be 300*l.* more than the plaintiff was entitled to; the plaintiff, on the other hand, contending that *Michael* was to receive but 150*l.* more than the plaintiff, and which would be 75*l.* more than half. On this point were cited *Bath & Montague's case* (a); *Bailey v. Lloyd* (b); *Lindo v. Lindo* (c).

(a) 3 Ch. Ca. 101. (b) 5 Russ. 344. (c) 1 Beav. 496.

THE CHANCELLOR concurred with the finding of 1850.
the Master on this point. ESTEN, V. C., gave no
opinion.

O'Lone
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2. The defendants contended that the Master should not have taken into account the item for board, &c.; that it was not embraced in the decree, as it was not a partnership dealing and transaction, and to such the decree was confined; that it *could not* have been embraced in this suit; and that this objection was now open to the defendants to make.—*Adams v. Claxton* (a); *Bick v. Motly* (b); *Rufford v. Bishop* (c); *Jenkins v. Briant* (d).

Counsel for the plaintiff contested these positions; and also urged that, if even it were not strictly within the reference, it was just that the item should be allowed, and the court would therefore not now interfere with what the Master had done.—*Pringle v. Crookes* Argument.
(e); *Armstrong v. Storer* (f).

THE COURT, however, said that the Master had exceeded his authority in this respect, and that the report must be corrected; but as the party could have applied to have the report reviewed, he should pay the costs of the day.

3. The defendants also contended that the Master should have allowed interest on the 150*l.* mentioned in the articles.

THE COURT overruled this objection.

4. The plaintiff's counsel asked for the costs of the suit, urging, in support of his views, that the suit had been successful; that it had been rendered necessary by the misconduct of *Michael*, in denying

(a) 6 Ves. 226. (b) 2 M. & K. 312. (c) 5 Russ. 346. (d) 6 Sim. 603. (e) 7 Beav. 257. (f) 9 Beav. 281.

1850. the partnership; and that his answers had, in that respect, been falsified.—*Stains v. Morris* (a); *Millington v. Fox* (b); *Colburn v. Simms* (c); *Mallabar v. Mallabar* (d).

O'Lone
v.
O'Lone.

Argument.

The counsel for the defendants resisted the claim for costs, and contended that the suit would have been necessary to take the partnership accounts, even if *Michael* had never denied the existence of the partnership; that the plaintiff was *particeps criminis*, as it appeared from the evidence in the Master's office that he had sworn in a suit brought by *Michael* in the Court of Requests against a debtor of the partnership, that the partnership had been dissolved.—*Debenham v. Ox* (e); *Newall v. Smith* (f).

In reply, it was contended upon this point that the evidence referred to could not be looked at by the court on further directions; that if it could it did not prove what was inferred from it on the other side; and that, as the circumstance took place some years before the bill was filed, it could not affect the question of costs in this suit.

The question of costs was spoken to twice.

Judgment.

THE CHANCELLOR.—The circumstances of this case are so peculiar, and the mode of conducting it has been so anomalous—the evidence has been brought before us so imperfectly, and the discussion upon that evidence has consequently been so limited—that I have found it difficult to dispose of the question of costs in a way quite satisfactory to my own mind. The best conclusion I have been able to form is, that the plaintiff, having established his case, is entitled to costs up to the hearing.

(a) 1 V. & B. 8, 15. (b) 3 M. & C. 338. (c) 2 Hare, 543. (d) Ca. t. Tal. 79. (e) 1 Ves. 276. (f) 1 J. & W. 263.

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In *Earl Nelson v. Lord Bridport* (a), Lord Langdale observed, "At one time there was more discretion as to costs in cases of this kind than at present. On many recent occasions the court has brought back the strict rule, though it still retains its discretion, yet it has acted on the rule that, *prima facie* the unsuccessful party is to be charged with cost of the suit." (b). Experience has, I think, clearly evinced the expediency of determining the question of costs, as far as possible, upon fixed principles; and the rule to which I have referred ought not, in my opinion, to be departed from where it is applicable, unless under circumstances clearly warranting the exception. But it is argued that the rule in question is not applicable to this case, which is said to be analogous to administration suits, in which, as beneficial to all, the costs of all,—creditors, legatees and next of kin—are paid from the fund in court (c). No authority was cited for that position, and I pronounce no opinion upon it. But assuming cases of this sort to be analogous to administration suits, and that the same general rule should govern the question of costs, still analogy shows, I think, that the defendant has so conducted himself as to have rendered the rule in question inapplicable. No doubt it is the general practice of the court, in administration suits, to provide for the costs of all parties from the fund to be administered; but even of suits in that class, parties may so conduct themselves as to render it absolutely necessary for the ends of justice that they should be charged with costs, instead of receiving them. Executors have peculiar claims, from their position (d), to the favourable consideration of the court; but where executors are wanting in the faithful discharge of their duty, and where a suit is thus rendered necessary, it is the constant practice to deprive them of

Judgment;

(a) 10 Beav. 306. (b) *Milligan v. Fox*, 3 M. & C. 353. (c) *Sharples v. Sharples*, McL. 506; See *Cafe v. Bent*, 5 Hare, 24. (d) *Low v. Carter*, 1 Beav. 430.

1850. costs, or to fix them with the costs of the suit, according to circumstances (a). And the same result constantly follows in those cases where the habit of the court to grant costs under ordinary circumstances is most clearly settled. Applying the principle to be deduced from those decisions to the present case, it is not to be doubted, I think, that this ruinous litigation has been entirely occasioned by the fraudulent conduct of the defendant. A partnership, the existence of which I see no room to doubt, as utterly denied in his answer; and this unwarranted denial is preceded by a course of conduct without justification—excluding the plaintiff from any participation in the partnership assets, and at the same time rendering nugatory all attempts to accommodate existing differences. But it is said that the existence of this partnership had been denied by the plaintiff himself, and this misconduct, it is argued, deprives him of all right to costs. It is unnecessary that I should dwell upon the gross immorality of the conduct attributed to the plaintiff. Words could but take from its deformity. But that transaction had no connection with the present suit. The defendant himself participated in the iniquity, and certainly cannot pretend to have been misled, for he was cognizant of all the facts, if indeed he was not the originator of the scheme. Under such circumstances, it cannot, in my opinion, affect the present question.

Judgment.

It was further urged by the learned counsel for the defendant, that his client's denial of the existence of this partnership ought not to vary the decree as to the general costs of the suit, inasmuch as the litigation being necessary for the purpose of taking the accounts of the partnership, the defendant's conduct can only have the effect of subjecting him to such portion of the general costs as may have been occasioned by

(a) *Sevier v. Galway*, 19 Ves. 413; *Hawes v. Tebbutt*, 1 J. & W. 202.

his improper defence. *Thompson v. Sheppard* (a) 1850.
 was said to be an authority for this position, and other
 cases are to be found to the same effect (b). It is
 obvious, however, that the principle of those cases
 can only apply where litigation is unavoidable, irre-
 spective of the inequitable circumstances complained
 of. The repression of unnecessary litigation is an
 object always kept in view in determining the ques-
 tion of costs; but this object would be entirely defeated
 were those chargeable with the inequitable conduct
 which has resulted in litigation, permitted to escape
 from the consequence of their conduct, because litigation
 might possibly have been necessary, although
 their conduct has been unimpeachable. Where litigation
 is, at all events, unavoidable, unfounded claims
 of a subordinate character cannot properly affect the
 general costs of the suit; but where litigation is not
 plainly unavoidable, and has actually originated in
 unfounded and inequitable claims, the effect of such judgment.
 conduct cannot be obviated by speculating on the
 possibility of litigation on the same subject under
 different circumstances. Here it is not to be doubted,
 I think, that this litigation originated in the miscon-
 duct of the defendant. An application to this court
 might possibly have become necessary under any
 circumstances; but such was by no means a neces-
 sary or perhaps a probable result. And it is quite
 impossible, I think, that any such consideration can
 have the effect of shielding the defendant from the con-
 sequences of his misconduct. Upon these grounds,
 I think I am not wrong in determining that the de-
 fendant must pay the costs to the hearing (c).

Upon the same principle, the defendant must pay
 so much of the costs of the reference as have been
 occasioned by his denial of the existence of the part-
 nership. Beyond that, no costs to either party.

(a) 2 Cox. 161. (b) *Hill v. Fulbroke*, 1 Ac. 574; *Johnstone v. Todd*, 8 Beav. 492. (c) *Russell v. Austwick*, 1 Sim. 62; *Pearse v. Green*, 1 J. & W. 140.

1850.

BECKETT V. REES.

Practice.

Where one of the defendants was a corporation for whom the plaintiff had entered an appearance under the 75th of Vice-Chancellor Jameson's orders : *Held*—no objection to a motion for an order to examine witnesses against the other defendants.

Statement.

Mr. *R. Cooper* for the plaintiff, moved for an order to take the depositions of witnesses before the Examiner. Mr. *Gwynne*, for the defendant *Rees*, objected that the plaintiff had proceeded under the 75th order (of V. C. Jameson's orders), and entered an appearance for the Toronto Dry Dock Company, who were defendants, and which he contended was a void proceeding—the order under which he had professed to act not applying to corporations; the effect therefore was that the cause was not at issue, and plaintiff was not in a position to examine witnesses, but

Judgment.

Per Cur.—That objection we think would come better after the evidence has been taken, and on a motion to suppress the depositions.

Order granted as moved.

ANDERSON V. HENDERSON.

Practice—Pro Confesso.

Where a defendant has entered an appearance, and afterwards makes default in answering, and the plaintiff desires to take the bill *pro confesso*, he must serve notice of the motion for that purpose on the defendant's solicitor.

Statement.

From the affidavit filed by the plaintiff, it appeared that the defendant had entered an appearance by his solicitor, and having made default in answering, the plaintiff had proceeded *ex parte*, and obtained an order to set the bill down to be taken *pro confesso*. The defendant had been served with process at Quebec, under an order authorizing that course.

Argument.

Mr. *Mowat*, for the defendant, moved to set aside the order obtained for taking the bill *pro confesso*, for irregularity, on the ground that no notice of the motion for that order had been served.

Mr. *Morphy*, contra, cited 1 Daniel's Ch. P. 576, 1850. and 1 Smith's Ch. P. 175 ; and referred to the 178th of V. C. Jameson's orders, as authorising the plaintiff in proceeding in the manner he had done in this case.

Anderson
v.
Henderson.

THE CHANCELLOR.—Whatever practice may be followed where the defendant has made default in appearing, no doubt can exist, we think, that it is necessary for the plaintiff to serve a notice of his intention to proceed to take the bill *pro confesso* in all cases where the defendant has appeared. And we desire to be understood as not laying down a rule that where the defendant does not appear such notice can be dispensed with.

Judgment!

Order granted as moved.

GOODERHAM V. DE GRASSI.

Mortgage—Costs.

The assignee of a mortgage security, who takes without the intervention of the mortgagor, is bound by the state of the account between the mortgagor or mortgagee ; and to a bill filled by the assignee of the mortgagee, for the foreclosure of the mortgage security, the mortgagee is not a necessary party, even when the mortgagor alleges that the mortgagee had been paid in full.

Dec. 16, 1850
and
Feb. 4, 1851.

Where a mortgagee files a bill to foreclose, and a question arises, at the hearing, whether he has not received sufficient to pay off the incumbrance before the commencement of the suit, the cost will be reserved.

In this case it appeared that some years ago the defendant had created a mortgage in favour of the Bank of Upper Canada ; that the bank had afterwards assigned their security to the present plaintiff, who received the conveyance without any communication whatever being had by him with the defendant ; that the day of payment mentioned in the mortgage having elapsed, the present suit was commenced, and now

Statement

Mr. *J. Crickmore*, for the plaintiff, moved, under the 77th of the orders of May, 1850, for an order for immediate reference to the Master, to take an account of what was due on the mortgage.

Argument.

1850. *Mr. R. Cooper*, contra, objected that the Bank of Upper Canada should have been made a party to the suit; he also filed an affidavit of the defendant, setting forth that the bank, previous to the assignment to *Gooderham*, had been in the receipt of certain rents, which were sufficient to pay off the debt originally secured by the mortgage; if the court, notwithstanding, were of opinion that the order should be made, he asked that the question of costs might be reserved.

Argument.

Judgment.

THE CHANCELLOR.—We are of opinion that the Bank of Upper Canada is not a necessary party to this suit. The mortgage having been assigned without the sanction or concurrence of the mortgagor, he cannot be bound by any statement then made as to the amount due upon foot of the security; he is clearly entitled to have the whole account taken from the beginning; and the present plaintiff, the assignee, can only claim such sum as may be found due thereon. The language of Lord *Eldon* in *Chambers v. Goldwin* (a), is very explicit upon this point: he says—“Where there has been an assignment without the previous authority of the mortgagor, or his declaration that so much is due, it is enough to make that man a party who has contracted to stand in the place of the original mortgagee and all assignees till the title was got in by himself.”

With respect to the form of the decree: The defendant having sworn that the mortgagee has been in possession, and that to the best of his belief he has received more than sufficient to pay the mortgage debt, to affirm the plaintiff's right to costs now would be obviously improper, because it may turn out that nothing remains due, and consequently that the expense of this bill of foreclosure, so improperly instituted, must be borne by him (b). On the other hand,

(a) 9 Ves. 269. (b) *Binnington v. Harwood*, T. & R. 477.

it is desirable to avoid the expense of hearing the cause on further directions, should that allegation prove unfounded. To meet that allegation, let the decree be framed as in *Knowles v. Chapman* (a); so that if the plaintiff establish any debt to be due on foot of the mortgage, his costs will follow as usual; on the other hand, if he fail, it will be open to the court to deal with the matter on further directions.

1850.

Gooderham

v. De Graaf.

Judgment.

In addition to the usual words in an order for immediate reference, the order in this case directed that, if "the Master on taking the aforesaid account shall find that there was not anything due to the plaintiff at the time of filing the bill in this cause, this court doth reserve the consideration of further directions, and of the costs of this suit, until after the Master shall have made his report, which in that event is to state what, if anything, has been overpaid by the said defendant."

ROGERS V. ROGERS.

Fraudulent deed—Parties.

Until a deed alleged to have been obtained by fraud is declared void it must be deemed a valid and subsisting instrument; therefore, where at the hearing of a foreclosure suit it appeared that after the execution of the conveyance to the mortgagee a voluntary deed had been executed by him, purporting to vest all his property in trustees, that he alleged and had gone into evidence to show this deed void, as obtained from him fraudulently, that some of the *cestuis que* trust had released their interest under the deed, and that the others had not any part in obtaining the deed and had not executed it: *Held*, that such other *cestuis que* trust must, notwithstanding, be made parties to the suit, and leave was given to the plaintiff to amend for that purpose.

Oct. 25 & 29,

1850, and

Feb. 21, 1851

This was a suit for the foreclosure of a mortgage which it was alleged the defendant had fraudulently obtained possession of and destroyed, and the principal questions were, as to the existence and terms of this mortgage, and as to the validity of a trust deed subsequently executed by the plaintiff, embracing all his real and personal estate. This deed was executed by all the trustees and *cestuis que* trust, except the defendant and two of his sisters and their husbands, who were not parties.

Statement.

Mr. Mowat and Strong for plaintiff.

Argument.

Mr. Morrison and Mr. McDonald for defendants.

(a) Seaton on Decrees, 150.

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Rogers.

Feb. 21.

Judgment.

ESTEN, V. C.—This suit was instituted by the plaintiff *Isaac Rogers* against the defendant *Joel Rogers*, who is his son. The bill alleges that some time in the year 1840 the defendant executed to the plaintiff a mortgage in fee of a piece of land, described as the southerly half of the south-east quarter of lot No. 93, on the west side of Yonge-street, in the first concession of the township of King, for securing to the plaintiff the sum 150*l.* on a day which was then past, with interest from some time in the year 1841, and that the defendant had improperly possessed himself of this mortgage, and that no part of the sum of money secured by it had ever been paid. It then proceeds to state that four other sons of the plaintiff, together with two other persons, had in the year 1841, by fraudulent practices, extorted from the plaintiff a deed of trust, whereby he had professed to convey and transfer all his real and personal estate to these persons upon trust, by lease or mortgage of the real estate, during the life of the plaintiff, to raise such sums of money as they might deem expedient, and to collect and convert into money the personal estate, and out of the monies thus obtained to apply such sums as they should think fit to the maintenance of the plaintiff, and after his death to proceed to a sale of the real estate, and to divide all the residue of the monies, arising by virtue of that indenture, among the surviving children of the plaintiff in equal shares. It then states that the trustees named in this deed entered into possession of the real and personal estate comprised in it, and while they were in such possession concluded an arrangement with the defendant, whereby they relinquished the principal of the mortgage to the defendant, on receiving from him a mortgage of the same lands, for securing the interest or an annuity equal to the interest during the life of the plaintiff. The bill then states that no attempt had been made to enforce this mortgage, although several of the payments secured by it had become due, and

that the plaintiff in the month of January, 1846, had instituted a suit against the trustees, in order to have the trust-deed declared void, whereupon the trustees executed a re-conveyance and re-assignment of all the real and personal estate comprised in the trust-deed, in favour of the plaintiff. The bill then, insisting that the trust-deed was a nullity and the settlement concluded under it was invalid, as made under the authority of a void instrument, and being itself a breach of trust, prays the usual decree with respect to the original mortgage, not seeking to set aside the trust-deed; but in case the court should deem the plaintiff not entitled to that relief, then a similar decree with respect to the mortgage for securing the annuity.

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The answer denies the existence of any such mortgage as is stated in the bill, or that any such ever existed, and states, that the plaintiff having made a gift of certain promissory notes (amounting to 150*l.*) to his wife, the mother of the defendant, for her separate use, she delivered them to the defendant in order to enable him to complete a purchase of fifty acres of land from his brother, *Josiah B. Rogers*, and that thereupon, as she had always intended these notes for the defendant, she accepted a mortgage from him of part of the land so purchased, being the same land as is mentioned by the bill to be comprised in the first mortgage there mentioned, for securing to her an annuity equal to the interest of the 150*l.* promissory notes during her life. The answer proceeds to state that the defendant's mother died before one year's annuity had become due, nevertheless, that the defendant had paid her the greater part of it, and that the mortgage for securing the annuity (which the answer treats as the one mentioned firstly in the bill) having become void on her death, had been destroyed by him then as useless. The answer insists on the settlement made under the trust-deed, which it repre-

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sents as a valid instrument, in bar of the claim for the promissory notes, which indeed are not claimed by the bill at all, and states an agreement made between the plaintiff and the defendant in the year 1838, to the effect that the defendant should support his parents on the farm during their lives, and that upon their death he should become entitled to the whole real and personal estate of the plaintiff, subject to the payment of 125*l.* or 150*l.*, as his parent or the survivor of them should appoint. The answer states that the defendant, in pursuance and part performance of this agreement, resided on the farm and supported his parents until the death of his mother, upon which event the plaintiff, having become dissatisfied with the agreement, executed the trust-deed which has been mentioned, and an arbitration was then entered into between the trustees and the defendant for the settlement of the differences between him and the plaintiff, but no award was made. The answer alleges that the plaintiff had ratified both the trust-deed and the settlement, and insists, in not a very accurate manner, that if the settlement should not be upheld, the agreement may be enforced which was made between the defendant and his father, and partly performed as before mentioned. A good deal of evidence has been adduced on both sides. This evidence leaves no doubt on my mind that there was such a mortgage as the bill seeks to enforce, and in this respect I consider the answer to have been falsified. The abstraction and destruction of this mortgage, as admitted by the defendant, was an act of spoliation on his part, which would justify any presumption against him; but the evidence makes it clear that it was a mortgage in fee of the same lands as are comprised in the second mortgage from the defendant to the plaintiff, for securing the sum of 150*l.* on a day which was past when the suit was instituted, with interest from a year after its date. The statement in the bill quadrates with the evidence

Judgment.

in this respect; and at first view, therefore, no obstacle would appear to exist to the plaintiff's obtaining the relief which he seeks in this suit.

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Rogers.

It appears, however, that the plaintiff executed a transfer of his real and personal estate in 1841, which passed the interest in this mortgage to certain trustees. The bill attempts to surmount this difficulty, by representing this deed as extorted from the plaintiff by the exercise of undue influence; but it does not seek to set it aside on that ground, and until a deed, alleged to have been obtained by fraud, has been declared void, I apprehend it must be deemed to be a valid and subsisting instrument. It is true that a suit was commenced against the trustees in this court in the year 1846, for the purpose of setting this deed aside, and that upon this occasion the trustees yielded to the demand, and executed a re-conveyance and re-assignment of the trust-estate: but the *cestuis que trustent* were not parties to that suit, and none of them concurred in the re-transfer excepting such of them as were trustees and *Eastman* and his wife. It appears that there were three other children of the plaintiff entitled under the trust deed, who were not parties to the re-assignment; and not only may these three persons or any of them become entitled to the entire interest in this mortgage by survivorship, but they are entitled at all events, I think, to insist upon its being placed in the hands of the trustees, with a view, (subject to the plaintiff's right to have it applied, if necessary, to his maintenance and support during his life,) to the distribution of the whole residue of the estate amongst the objects of the trust, when the proper time for that proceeding shall arrive. It is quite impossible, therefore, that the plaintiff can be permitted to enforce this mortgage-security, under present circumstances, for his own exclusive benefit; and the only way, as appears to me, in which he can accomplish this subject, is to

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amend his bill by the addition of proper parties, and to seek the overthrow of the trust-deed. This, I think, it is competent for the plaintiff to do; but it does not appear to me that he can at this stage of the suit amend his bill by treating that as a valid instrument which throughout the bill, as it is, he represents as a nullity, in consequence of the fraud in which it was concocted (a). I make this remark with a view to the possibility of the plaintiff desiring to sustain the trust-deed, and to enforce the mortgage-security in question, in order to its application under the trusts of that instrument, as a more convenient course than that of seeking its subversion. Supposing, therefore, the plaintiff to still wish to enforce for his sole benefit the mortgage first mentioned, in preference to the acceptance of the subsequent security, it appears to me that he cannot proceed in that course without amending his bill in the way I have mentioned. I think it right, however, to state the impression which the evidence has produced on my mind, with respect to the other parts of the case, as it may afford some assistance or guide to the parties in determining the course that they will adopt; although they will bear in mind that I have not considered these points with a view to their immediate decision, or looked into all the cases that were cited with respect to them, as not thinking it necessary in this stage of the suit to do so. Upon the evidence, as it stands, it seems to me that I could not satisfactorily determine the question regarding the execution of the trust-deed, whether it was unduly obtained by the trustees, or freely and voluntarily executed by the grantor, without the intervention of a jury. Supposing, however, this instrument to have been obtained by undue means, there would, I think, be much difficulty in attributing to the plaintiff any confirmation of it from his subsequent conduct under the circumstances of the case, dependant as he was upon the trustees, and

(a) Field v. Delaney, 1 Moll. 174.

completely as he was in their power, after he had divested himself, and put them in possession, of all his property. If the trust-deed should be declared void and set aside, the claim of the plaintiff would encounter other obstacles. The first of these would be, the settlement concluded between the trustees or some of them and the defendant, upon which, I think, supposing it capable of being upheld, the defendant would be entitled to insist in bar of the plaintiff's claim. The answer asserts this arrangement to have been within the competence of the trustees, and at all events to have been concurred in and ratified by the plaintiff. It appears to have been the intention of the parties to the trust-deed to confer on the trustees a power of compounding debts: but to accept a security for the mere interest of a debt, in lieu of another security on the same property for both principal and interest, would not be a proper exercise of this discretionary authority, and could not, as a bare transaction, be sustained; but under the circumstances of this case, it is by no means clear that the settlement in question was not a prudent and proper exercise of authority on the part of the trustees—particularly with reference to the agreement alleged, and, as appears to me, proved to have been concluded and acted upon between the plaintiff and the defendant, and under which the defendant would appear to have acquired certain rights; and it is possible that, although the trust-deed should be set aside, a dealing under it had in the meantime, and within the apparent authority of the trustees, might be sustained. As to any express concurrence in, or ratification of the settlement on the part of the plaintiff, the evidence is so conflicting that further inquiry would, I think be requisite for the due determination of the question.

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v.
Rogers.

Judgment.

It is true that between four and five years elapsed before any proceedings were instituted by the plain-

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Judgment.

tiff for the purpose of destroying the effect of this settlement: but under the circumstances, and for the reasons already mentioned, it would be difficult to attach any weight to this apparent acquiescence. The evidence points to acts of confirmation on the part of the plaintiff, as suggested by the answer, which might form the proper subject of enquiry, in case it should become necessary to determine the effect of the arrangement in question. If the settlement should be deemed not binding on the plaintiff, it would appear that the defendant must be admitted to insist on the effect of the agreement concluded between himself and his father, and appearing to have been acted upon by both for three years, subject to any question that may arise on the evidence, as to its being broken or abandoned by the defendant, and the effect of such conduct in extinguishing his rights under it. If I rightly understand the effect of this agreement, it would, if upheld, entitle the defendant to the principle of this mortgage after his father's death, and virtually confine the relief to be administered in this suit to the benefit of the second mortgage. This is prayed in the alternative by the bill, and not refused by the answer, but costs are claimed from the time of the tender, alleged in the answer, and, I suppose, not disputed; the validity of which claim would depend of course on such tender embracing all that the plaintiff at the time was entitled to claim.

The result is, that the plaintiff may, if he choose, have relief under the second mortgage mentioned in the pleadings. In this case, he must pay his own costs of the parts of the suit which will thereby be abandoned. I do not give the defendant his costs, because his answer has been falsified, and his conduct in the transaction fraudulent and improper. As to the rest of the costs, the plaintiff will of course be entitled to them in the same manner as mortgages usually are, subject to any question that may arise

in consequence of the tender made by the defendant and rejected by the plaintiff. Should the plaintiff elect to enforce the first mortgage for his own exclusive benefit, the cause must be adjourned, with liberty to the plaintiff to amend his bill by adding as parties the persons interested under the trust-deed. This will be without costs, the objection not having been raised by the defendant, but by the court finding it impossible to make such a decree as is desired in the present shape of the record.

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v.
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Judgment.

O'NEAL V. McMAHON.

Specific performance—Parties.

A party contracted to sell a piece of land, whereupon the purchaser was let into possession and the vendor executed a bond intended to be conditioned for the conveyance of the land so contracted for; but, by mistake the number of the lot was omitted, and the bond was otherwise defective. On a bill being afterwards filed by the vendor against the heir-at-law of the purchaser, the court considered that the plaintiff was entitled to rely upon the parol agreement partly performed, and that the bond which had been executed might be used by him to aid in proving the terms of the contract, in pursuance of which the purchaser had taken possession.

Nov. 15,
and
Dec. 16, 1850

Where under the terms of the contract the purchaser is let into possession of the premises agreed to be conveyed; but in consequence of default in completing the purchase, the vendor institutes proceedings at law, under which the purchaser is ejected from the property; the vendor cannot afterwards call for a specific performance of the contract, but he has a right to come into this court, in order that either the contract may be specifically performed, or the purchaser's rights so bound as to enable the vendor to dispose of the property.

In proceedings against the heir-at-law of a purchaser, in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased is a necessary party to the suit; and without one a suit is defective, though an executor *de son tort* is a defendant, and though no administration had been taken out before the filing of the bill.

The facts of this case, so far as the present decision is concerned, are set forth fully in the judgment.

Statement.

Mr. Morrison and Mr. McDonald, for the plaintiff, cited *Mortimer v. Orchard* (a), *Stangroom v. Townsend* (b), *Clift v. Schwabe* (c).

Argument.

Mr. Turner and Mr. C.W. Cooper, for the defendant.

(a) 2 Ves. Jr. 243. (b) 6 Ves. 328. (c) 3 C. B. 437.

to have been truly stated in the bond executed upon the occasion of the purchase. The infant answers in the usual manner by submitting his rights to the protection of the court. The answers were replied to, and evidence was adduced on behalf of the plaintiff. The defendants adduced no evidence, but cross-examined the plaintiff's witnesses, and produced and proved the bond mentioned in the pleadings. This bond, when examined, was found to be so imperfect, not mentioning any land in particular, that it became necessary to abandon it altogether as a foundation of the suit; and the plaintiff was forced to rely on the parol contract partly performed, and the bond became an item in the evidence, by which it was to be established. I think the plaintiff was entitled to rely on the parol agreement and the part performance of it and that a contract for the purchase of the land in question has been proved upon the terms mentioned in the bond, with the exception of the price, which upon the evidence is left *in ambiguo*. The bond is of course evidence upon this point, but not so important as might be supposed, it being very apparent that it was copied carelessly from another bond executed on the same day, and a strong presumption, amounting almost to a certainty, arising, that in one respect at all events the price was mistaken. It is not proved, as against the infant defendant, that possession was given and taken in pursuance of the contract, although there is no doubt of the fact, which is admitted by the answer. Upon these points I should think that under the circumstances, the plaintiff would be entitled to an inquiry, if it were necessary; but when the circumstances of the case are considered, the nature of the suit appears to be such as to dispense with proof with respect to the infant.

1850.

O'Neal
v.
McMahon.

Judgment.

It was suggested by the court in the course of the argument that the plaintiff, having deprived the defendants of the possession to which according to the

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McMahon.

Judgment

terms of the contract they were entitled, he could not claim a specific performance of it. For this position the case of *Knatchbull v. Grueber* (a) is a clear authority. But the plaintiff contended that he is entitled at all events to call upon the defendants specifically to fulfil the contract, or to have their right to a specific performance bound in such a manner as to render the property in his possession disposable. This claim seems to be a reasonable one; but I cannot see what right he has to have the bond delivered up to be cancelled, this depends upon his right to a specific performance, which he had forfeited by depriving the defendants of the possession of the property. If the infant were *sui juris*, he might accept or decline a specific performance, and if he declined it, the bond would be suffered to remain in the hands of the defendants. The infant is not competent to make this election, and an inquiry must be directed in order to ascertain whether or not it is for his benefit that the contract should be specifically performed. Should the master report in the negative, the right to a specific performance will be bound by the decree. If the master should report in favour of a specific performance, it will be decreed. An inquiry must be directed as to the price at which the purchase was made, and as to whether the title has been accepted, or if not, whether a good title can be shown. Further directions and the consideration of costs should be reserved. The suit, however, is defective at present for want of parties. The personal representative of the purchaser should be before the court.

The plaintiff has no pretence for claiming either the costs of the ejectment or compensation for the loss of possession, whether a specific performance is decreed or not.

I have said this much with respect to the decree

(a) 1 Mad. 153; S. C. 3 Mer. 124.

which I consider it right to pronounce in this case, 1850.
in order that the parties may, if they think fit, make
some arrangement for the prosecution of the suit with
as little expense as possible. At present the cause
must be adjourned without costs, with liberty for the
plaintiff to amend his bill by making the personal
representative of Peter McMahon a party.

O'Neal
v.
McMahon.
Judgment.

DEY V. DEY.

Creditor's suit—Administrator ad litem.

Where in a creditor's suit, to administer the estate of a deceased debtor, Dec. 16, 1850
to whose estate administration *ad litem* had been taken, the bill alleged
that there were no personal assets, and the parties interested in the real Feb. 4, 1851.
estate, had suffered the bill to be taken against them, *pro confesso*,
and did not appear at the hearing; the court made the usual decree,
without requiring a general administration to be first obtained.

This was an administration suit. At the hearing, Statement.
a doubt was suggested by the court, whether a de-
cree, as asked, could be made in this cause, there
being no general personal representative before the
court.

Mr. J. Crickmore, for the plaintiff.

Argument.

Mr. Turner, for the administration *ad litem*.

The bill was taken *pro confesso* against the per-
sons interested in the real estate, and they did not
appear at the hearing.

THE CHANCELLOR. — This is a creditor's suit.
The plaintiffs, creditors of Peter Dey, who died Feb. 4, 1851
intestate, seek to have his real assets applied in
satisfaction of their debt; and the relief would not
have been open to question, but for the doubt sug-
gested at the hearing, whether the limited adminis- Judgment
tration committed to the defendant, Charles Folwell,
can be regarded as a sufficient representation of the
estate of the intestate, for the purpose of this suit.

The law upon this point would seem still, to

1851. some extent, unsettled. For although the difficulties growing out of Sir *Lancelot Shadwell's* judgment in *Davis v. Chanter* (a) have been removed by the decision of Lord *Cottenham*, when that case came before him on appeal (b); and although his Lordship would seem to approve the reasoning of Lord *Redesdale* (c) upon the subject, in his treatise on pleading, which goes far to sustain the plaintiff's position; still the doubt expressed by Sir *James Wigram* (d) as to the sufficiency of a limited administration where that is not commensurate to the purposes of the suit, and it is in the power of the plaintiff to obtain a general representation, and the direct decision of the Vice-Chancellor, *Knight Bruce*, (e) on this very point, would have called for further consideration before determining the estate of the intestate to be sufficiently represented in this case, but for a peculiarity to which I am about to advert. The parties entitled to the real estate of the intestate, did not appear at the hearing. Now, the account and application of the personal estate, in suits of this kind, is directed for the protection of those entitled to the real assets, and had they appeared and insisted upon this objection, it would have been proper to have ordered the case to stand over for the purpose of enabling the plaintiffs to obtain a general administration. But the bill has been taken *pro confesso*, against the parties entitled to the real estate; and as it negatives the existence of any outstanding personal estate, a decree directing the application of the real assets of the intestate, can work no injustice, and for this purpose the record is properly constituted.

Judgment.

(a) 14 Sim. 212. (b) 2 Phil. 545. (c) Mitford's Pleading, 177. (d) *Faulkner v. Daniel*, 3 Hare, 208. (e) *Robinson v. Bell*, 1 Deg. & S. 630, see *Croft v. Waterton*, 13 Sim. 653.

CUMMINGS V. MCFARLANE.

1850.

Dec. 6, 1850,

and

Feb. 4, 1851.

Trustees—Costs.

Where trustees filed a bill for the purpose of having the trusts of the deed appointing them carried into execution, without suggesting the existence of any difficulty in the way of their winding up the affairs of the estate, the court refused them their costs of the suit.

The bill in this cause was filed by trustees appointed under deed executed by two of the defendants in 1840, for the benefit of creditors. The usual decree of reference was made, and the clause now came on for further directions. No opposition was offered to the decree prayed being made, except so far as it asked payment of plaintiff's costs. Statement.

Mr. *Turner*, for the plaintiffs, cited *Greenwood v. Wakeford* (a), *Goodson v. Ellison* (b), as warranting the proceedings adopted by the plaintiffs. *Low v. Carter* (c) shews that executors are entitled to their costs of passing their accounts; and the same rule, he submitted, existed with respect to trustees as executors. Argument.

Mr. *Morphy* contra. The plaintiffs have failed to shew the existence of any circumstances requiring them to incur the expense to which they have attempted to make the trust fund liable: they must pay their own costs.

THE CHANCELLOR.—The only question argued upon the hearing of this cause on further directions, was, whether the plaintiffs were entitled to receive their costs of this suit from the trust fund. By an indenture dated 18th December, 1840, *Cummings* and *McFarlane*, two of the defendants, assigned all their estate, real and personal, to the plaintiffs, upon trust, to realize the same as speedily as possible, and divide the proceeds amongst such of their creditors as should sign the deed, share and share alike. In Judgment.

(a) 1 Beav. 576. (b) 3 Russ. 583. (c) 1 Beav. 426.

1851. pursuance of these trusts, which they accepted, the plaintiffs realized the whole or the greater part of the estate, and, having paid thereout one dividend to the various creditors who had signed the deed, they filed the present bill for the purpose of having the trusts of the indenture carried into execution under the direction of this court. Under these circumstances, the trustees, without so much as suggesting any difficulty rendering this suit necessary or proper, claim to be allowed their costs, as between solicitor and client; while the learned counsel for the defendants, without seeking to charge the plaintiffs with costs, insists that they are not entitled to receive them.

Judgment.

We had this subject under consideration recently, in the case of *Baldwin v. Crawford* (a); and, upon reconsideration, we adhere to the opinion which we then expressed. We have not been referred to any authority, and have not been able ourselves to discover any principle, upon which this class of trusts can be satisfactorily distinguished from the one which formed the subject of that suit, in relation to which the law seems to us abundantly clear and satisfactory. In *Howard v. Rhodes* (b), although those beneficially entitled made no objection to the payment of the trustee's costs out of the fund, Lord Langdale observed, "that it was the duty of the court to protect the estate against being burthened with the costs of a trustee who had declined, without any cause assigned, to perform the trusts reposed in him, and had thereby rendered the suit necessary." In *Campbell v. Home* (c), Lady Campbell had appointed a very large trust fund in favour of one of her daughters, just arrived at age, and one of the trustees refused to join in the transfer of the fund, without having the sanction of the Court of Chancery, under the belief -- not unreasonably formed -- that the appointment had been made by

(a) Ante vol. I, p. 202. (b) 1 Keen, 581. (c) 1 Y. & C. C. C. 664.

Lady Campbell for the purpose of possessing herself 1851.
of the trust fund to meet her own necessities. In ^{Chmings}
that case, although Colonel Home was confessedly ^{V.}
actuated by a laudable desire to protect the interest ^{McFarlane.}
of the *cestuis que trustent*, the infant children of Lady
Campbell; and although the circumstances would
seem fitted to justify hesitation, the Vice-Chancellor
Knight Bruce refused to him the costs of the suit
from the fund. He observes, "With regard to the
history into which the defendant has entered of for-
mer suits and former disputes, and the real or sup-
posed misconduct on the part of the mother of the
plaintiff, I have nothing whatever to do with it.
The question now before the court is a mere ques-
tion of right. Considering the line of defence taken
by the answer, and the quantity of irrelevant matter
into which the defendant has entered; and consider-
ing also the absence of any ground for the objection
which has been brought forward against this appoint- Judgment.
ment, it is impossible for me to give Colonel Home
his costs. I do not, however, think it necessary to
fix him with costs." In *Penfold v. Bouch* (a), Miss
Phillips had transferred a certain amount in three
and a half per cent. stock to the defendants, one of
whom was her brother, under such circumstances as
constituted, in their opinion, a trust for her separate
use. Miss Phillips afterwards intermarried with
the plaintiff *Penfold*, and, the trustees having refused
to transfer the fund without the sanction of the Court
of Chancery, or a previous settlement upon Mrs.
Penfold and the issue of the marriage, the bill was
filed. In disposing of the question of costs, Sir
James Wigram said, "I have read the pleadings, for
the purpose of seeing whether, if there was no ground
for giving the trustees of the fund their costs, I might
at least excuse them from paying costs. There was
however, no evidence of the terms of the trust, and

(a) 4 Hare, 271.

1851. nothing from which the Court could infer that it was not a trust for *Emma Penfold* absolutely. If otherwise, the defendants might probably have elicited the terms by bill of discovery, but no such bill had been filed. The defendants admitted that in their resistance to the demand, they had not been directed by the opinion of any competent legal adviser. The suit could be of no benefit in the protection of the *cestui que trust*, and could only have the effect of diminishing the fund. The decree sought by the bill must be against the trustees of the fund with costs." In a very recent case (a), trustees refused to transfer the trust fund under circumstances which afforded strong ground for the argument that they were entitled to the protection of the court. The stock had been settled upon marriage in trust for the wife for life, with remainder to the husband for life, with remainder to the children of the marriage. The wife had died, and the trustees were required to transfer the fund under an arrangement entered into between the father and his daughter, the only child of the marriage, shortly after she had attained her age. The trustees refused to act, unless authorized by the Court of Chancery, and it was contended that they had used a sound discretion and were entitled to the costs. But in delivering judgment the learned Vice-Chancellor observed, "It may have been the duty of the trustee to satisfy himself whether influence was unduly exercised, and whether, according to the arrangement, the daughter was to have had her fair share. He made no endeavour to satisfy himself upon the subject, and has not suggested that there was any difficulty in ascertaining the truth in these respects. He has acted erroneously, and the suit was not instituted without sufficient reason. He must pay his own costs of the suit, and those of the plaintiffs."

Judgment.

These authorities appear to us not only to lay

(a) *Firmin v. Pulham*, 1 De G. & S. 99.

down the rule which ought to govern the present case, but also to afford a satisfactory answer to the various arguments upon which the plaintiffs rested their right to costs. Unquestionably trustees have a strong claim to the protection of this court, where difficulties arise in the discharge of their onerous, and often delicate, duties. It would be alike repugnant to the sound policy of the law, and subversive of justice in the particular case, were we to compel parties under such circumstances to act upon their individual responsibility. But the very term protection implies danger; and we cannot sanction the proposition, that a trustee, who, without cause, or from improper motives, institutes, or necessitates, a suit in this court, ought to be indemnified from the consequences of such conduct by having his costs paid from the fund which it was his peculiar duty to have protected. The distinction was well expressed by the present Master of the Rolls in *Coventry v. Coventry* (a), where trustees who had filed a bill to be relieved from certain trusts, owing to the improper conduct of their *cestui que trust* claimed to be allowed the costs of the suit. He asks, are these trustees, under the circumstances stated in the bill, to go on in the execution of a trust which they undertook only for the benefit of the tenant for life and his family, but which, by his conduct, has involved them in difficulties and responsibilities which they never contemplated? I am of opinion that they are not. I had lately occasion to consider the case of a trustee coming without any reason to be discharged from the trust, at the expense of the estate, and I did not think that the estate ought to bear the expense. These trustees do not seek to be discharged without reason, but in consequence of the acts of the tenant for life; and, being of opinion that they are entitled to the relief sought by the bill, the only question is, who are to pay the costs. Are the trus-

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Judgment.

(a) 1 Keen, 760.

1851. *Cummings v. McFarlane.* tees to pay them? Certainly not; neither ought the estate under the circumstances to be burthened with the costs, and I think they will be properly paid out of the interest of the tenant for life."

Judgment. The authority principally relied upon by the learned counsel for the plaintiffs, was *Low v. Carter (a)*. That case appears to us to furnish a strong argument against the plaintiffs. For, although the bill there was filed by executors, who, as subjected to peculiar liabilities, are entitled to special consideration in this court, yet even with respect to executors, Lord *Langdale* is very far from laying down the broad rule which it would be necessary for the plaintiffs to establish to entitle them to costs in the present case. As to the costs of the suit, the Master of the Rolls observes:—"I cannot conceive that anything could be more hard than that executors who are called on to administer estates, *where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a court of equity*, should be deterred from coming to this court by being visited with the costs of the proceeding."

Now, to apply the rule to be deduced from these cases to the present question—we entertain no doubt that the plaintiffs have no right to be paid their costs out of this trust fund. Had they been met by any substantial difficulty in the discharge of their duty, reason and authority would have warranted them in seeking the assistance of this court in the solution of that difficulty. But as matters stand, this bill has been filed without the suggestion of any such difficulty, and therefore the plaintiffs' claim to be allowed their costs is entirely without foundation. Whether the circumstances would not have warranted a decree still more unfavourable, had it been asked, we need not decide.

(a) 1 Beav. 430; *Knatchbull v. Fearnhead*, 3 M. & C. 122.

MORIN V. WILKINSON.

1850.

Shewing good title—waiver of—Costs.

Nov. 1, 1850,

and

Feb. 14, 1851

Where a purchaser executed a bond for payment of purchase money of land which he had contracted to purchase, and was thereupon let into possession in pursuance of the contract; the purchaser having afterwards made default in payment, and having refused to accept the title produced by the vendor, an action at law was commenced upon the bond; whereupon the purchaser filed his bill in equity, praying for the specific performance of the contract, if a good title could be shown; or, in the event of the vendor being unable to show a good title, then for an injunction restraining the action; and that the bond might be delivered up to be cancelled. Upon a reference the vendor failed to show a good title, and the court decreed the other branch of the prayer, but (the court being divided in opinion on the question of costs) without costs.

Semble—That from the peculiar mode of dealing with landed estates in this country, the court would not introduce the strict English rule with respect to waiver of title by acceptance of possession.

The original bill in this case alleged a contract in July, 1846, for the sale of a lot of land in *Sandwich*, by *Robert George Watson*, and *Alexander Wilkinson*, (the defendants thereto) as executors and trustees under the will of *John Gentle*, to the plaintiff *Morin*, for £150; that in pursuance of such contract, the plaintiff, *Morin*, as principle, and the other plaintiffs, as sureties, executed a joint and several bond to *Watson* and *Wilkinson*, to secure the payment of the purchase money, on the 31st of August following; on which day a meeting took place by appointment, between the plaintiff *Morin*, the defendant *Watson*, and a gentleman acting on behalf of *Morin*, and who it was asserted was about to lend *Morin* the money requisite to complete his purchase; and it was then stated to *Watson* that the money was ready to be paid, if he and his co-executor and trustee were prepared to execute a sufficient deed, when *Watson* stated that he was not in a position to do so, as *Wilkinson* was absent, and that he (*Watson*) had no power of attorney from him. The bill then stated that it was suggested and agreed to by *Watson* that such offer to pay should be treated as a legal tender of the purchase money, and that from that day neither of the plaintiffs should be put to any costs or expenses in respect of the sum of 150*l.* secured by the

Statement.

1850. bond, or interest thereon, and that on *Wilkinson's* return a proper conveyance should be executed; that notwithstanding this arrangement, and shortly after it was entered into the defendants instituted three actions upon the bond against the plaintiffs, in all of which verdicts had been taken. The bill further stated that *Morin* had always been ready to pay the amount of the purchase money, upon having a deed executed to him, and prayed a specific performance of the contract, and an injunction against the proceedings at law.

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Wilkinson.

Statement.

Robert George Watson having died, the suit was revived against *Alexander Wilkinson*, who by his answer set forth that the land contracted to be sold to the plaintiff *Morin*, together with others, was devised by *John Gentle* to his five children as tenants in common, with power of sale in the executors with the consent of a majority of the devisees, all of whom had executed a power of attorney to *Watson* and *Wilkinson* authorizing them to sell. The answer then stated that in *Wilkinson's* opinion, the offer of payment, at the meeting referred to was colorable, and was made with a view of preventing the enforcement of the bond; that in fact no tender or offer of payment had ever been made, but on the contrary, frequent applications had been by *Watson*, after the money secured by the bond had become due for payment thereof, he offering to procure a valid conveyance to be made; and that *Morin*, through his attorney, had by letter, which was in evidence in the case, offered to abandon the purchase.

The cause having been brought on for hearing, the usual reference of title to the master was directed; and he having reported against the title, and the cause coming on upon further directions,

Mr. Morphy, for the plaintiffs, cited *Grover v.*

Hugill (a), Townsend v. Champernowne (b), Vancouver v. Bliss (c), and Daniel's Chancery Practice, 1196. 1850.
Morin
v.
Wilkinson.
 to show that, had the plaintiffs succeeded in obtaining a decree for the main object of the suit—the specific performance of the contract—they would have been entitled to their costs; their having failed in this object was no fault of theirs, but attributable solely to the vendor being unable to show a good title. Under these circumstances, he contended that the plaintiffs were entitled to their costs of the suit, if the prayer of the bill were granted so far as to enjoin the proceedings at law, and to order the bond to be delivered up to be cancelled.

Mr. R. Cooper for the defendants, cited *Cooper v. Dean (d)*, and relied on the fact of acquiescence on the part of the plaintiffs as sufficient ground to deprive them of costs.

THE CHANCELLOR.—It is very hard to dispose Feb. 14, 1851
 satisfactorily of the question of costs upon the extremely imperfect evidence submitted to us in this case. Had the question been simply this, whether a vendee failing in his bill for specific performance, on account of a defect in the title, but succeeding for the same reason, in obtaining an injunction to restrain legal proceedings upon the contract, ought to receive his costs? I should have
Judgment.
 been disposed to have acceded to the plaintiffs' argument. The plaintiffs' proposition seems to be consonant to reason; and I am inclined to think it in accordance with authority also, although upon that point, I pronounce no decided opinion (e). But the determination does not depend upon that question merely. Several other considerations are obviously very material. And yet the evidence affords such scanty materials for our guidance—it furnishes so

(a) 3 Russ. 429. (b) 3 Y. & C. 524. (c) 1 Ves. 462. (d) 1 Ves. Jun. 565. (e) *Grover v. Hugill*, 3 Russ. 429.

1851. imperfect a narrative of the transaction, that we are entirely unable to hazard an explanation of such of their dealings as have been disclosed, or to conjecture how so simple a matter has been left in such entire obscurity.

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Wilkinson.

Judgment.

We are informed that the plaintiff *Morin* was admitted into possession of the property in question—a house in the own of Sandwich—upon the execution of the contract, and that he continued in possession at the time this suit was instituted; but we are left in entire ignorance of the circumstances under which, and the terms upon which the parties so dealt with this property. We are to assume, I suppose, upon this argument, that the title had not been accepted, otherwise a reference would not have been directed. And, indeed, had it been otherwise—had we been considering the question prior to the reference—I am fully sensible of the great caution required in applying the English doctrines of waiver and laches to cases arising in this country. Some of these difficulties, in relation to the doctrine of laches, were adverted to in the recent case of *O'Keefe v. Taylor*, (b), and I am of opinion that the application of this doctrine of waiver, whenever the question may call for consideration, will be found to be attended with difficulties of the same sort. In England, where the conduct of transactions of this sort is committed, as a general rule uniformly and immediately to professional men, where titles are disclosed and investigated in a way almost unknown here, the assumption of possession, or the neglect to institute proceedings promptly, may furnish data sufficient to lead to conclusions which would be quite unwarrantable where business is conducted as in this Province, without such formalities. But, to whatever weight those considerations may be entitled where

(b) Ante p. 95.

matters of this sort have been conducted without the intervention of legal agents; and I am disposed to consider them of very great weight. It is not to be forgotten that in this case the plaintiff *Morin* had from the first the benefit of legal advice. Indeed, from an early period both parties appear to have committed their interests into the hands of professional gentlemen. And although the defendant may be precluded from arguing that the occupation of this property by *Morin* amounted to an acceptance of the title, still that occupation has, in my opinion, a very important bearing, in connection with the circumstances to which I am about to refer, in determining the question of costs (a).

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v.
Wilkinson.

This contract should have been completed, and the purchase money paid in the month of August, 1846. Some time after the period so fixed, *Morin*, through the medium of his legal adviser, professing himself ready to pay the purchase money, objected that the vendors were not in a position to complete the contract in consequence of the absence of one of the two persons who acted in the sale as joint attornies of the proprietors. This objection seems to have been utterly futile, for *Watson* swears in his answer that he was at all times prepared to have procured the execution of the deed by the principals. How the objection came to be acquiesced in is unexplained; but the fact seems to me material, as showing that the parties at that early period were not proceeding without reference to the state of the title, because (with reference to this very question of title) the absence of one of the attornies is fixed upon as the only obstacle to the completion of the contract. In consequence of this objection, considerable delay arises; but in the month of December, 1846, upon the return of the other attorney, *Watson* and *Wilkinson* are again urged to perform this agreement.

Judgment.

(a) *Vancouver v. Bliss*, 11 Ves. 463.

1851. Upon that occasion no further objection is made to the title; *Morin*, on the contrary, appearing to treat the difficulties as at an end, requests the parties to extend the time of payment until he should have realized a certain fund from which he proposed to pay the purchase money, the want of the means being, so far as I can find, the only obstacle to the completion of the transaction. The parties would seem to have acquiesced in this request, and to have desisted from further proceedings until the month of April following, when an action was instituted upon the bond which the plaintiffs had executed. The evidence affords no connected narrative of the events subsequent to the institution of this action; but from the pleadings and admissions I gather that it was, throughout, a question of time with the plaintiffs. When the action is instituted, no objection is made to the title offered by the vendors. On the contrary, *Watson* swears in his answer that the plaintiff *Morin* had agreed at one time to execute a confession of judgment in the action at law; and when pressed to comply with that promise, declined only in consequence of disappointment in the realization of funds from which he had hoped to meet the claim; and, although declining formally to confess the action, he by no means denied the defendant's right, but asserted confidently that he would be prepared to meet his engagements by the time judgment would have been recovered in the ordinary course of legal proceedings. Indeed, *Watson* swears that he offered to rescind the contract on that occasion, and that *Morin* refused to accede to his proposition. The next step in the transaction seems to have been an application on the part of *Morin*, that the action should be stayed until the return of his attorney, Mr. *Prince*, from Montreal. This application appears to have been acceded to also, for, in the month of August, following, the action was not, so far as I can judge, further advanced;—clearly no trial had taken place.

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Wilkinson.

Judgment.

But Mr. *Prince's* return to Sandwich, about that time, produced only a request that the defendant would agree to rescind the contract, and restore possession of the property, upon payment of the costs then incurred; and that proposal was rested entirely upon *Morin's* inability to meet his engagement. During all this period *Morin* continued in possession of the property without urging any objection to the title, or making a single remonstrance, so far as I can find, against the proceedings adopted by the vendors.

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Wilkinson.

The conclusion at which I have arrived, from an attentive perusal of the pleadings and admissions is, that the inability of *Morin* to meet his engagements has been the real cause of all the delay, and all the litigation which has unfortunately arisen in this case. Without having paid any part of the purchase money, he continued in possession of the property for a very long period, and thus not only necessitated litigation in the first instance, but throughout its progress, he seems to me to have almost acquiesced in the steps taken by the defendant, and at last proposed a rescission solely in consequence of his own inability to fulfil the contract. The proceedings at law ought, I think, to be enjoined. But having afforded that relief to *Morin*, the ends of justice would be better attained by ordering him to pay the defendant's costs, rather than by declaring him entitled to receive the costs of a litigation of which he seems to me to have been the source.

Judgment.

I have arrived at this conclusion with great diffidence, because my learned brother takes a different view of the subject. But, having formed a clear opinion, the defendant is entitled to the benefit of it. The decree therefore will be without costs.

ESTEN, V. C.—The lands in question in this cause, were given by the will of *John Gentle* to his five

1851. children as tenants in common in fee, with a power of sale in his executors and trustees, the defendant *Morin* and his co-trustee, one *Watson*, exercisable with the consent of the majority of the children. These afterwards gave a power of attorney to the executors to proceed to a sale of the property; and in the spring of 1846, they entered into a contract with the plaintiff *Morin* for the sale of it to him, under which contract he appears to have entered into possession. Upon this occasion, *Watson* gave the plaintiff his own bond for the conveyance of the property, *Wilkinson* appearing not to have been on the spot so as to join in it, and the plaintiffs executed and delivered to *Watson* a bond for the payment of the purchase money, which, it must be inferred from the event, did not disclose the circumstances of the case sufficiently to afford a successful defence to any action brought upon it, in case of failure to produce a good title to the property. An action was commenced on this bond about a year after the contract was entered into, in which the executors obtained a verdict for the purchase money. At the time of commencing this action, it appears from the event that *Morin* had not waived his right to have a good title shown to the property, and that the defendants (the plaintiffs in the action) could not shew a good title. The plaintiffs thereupon instituted the present suit to obtain a specific performance of the contract, if possible, or at all events protection against the action. The defects in the title were of such a nature that they must have been known to the defendants. They had not the title deeds, and could not produce them, and the concurrence of two incumbrancers was necessary to the completion of the title, which has not been procured. Under these circumstances, we cannot fail to see that the vendors had no right to bring the action by bringing which the present suit was rendered necessary; and that the plaintiffs have succeeded in all respects,

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v.
Wilkinson,

Judgment.

except so far as the default of the defendant in not showing a good title, has rendered success impossible. I think that a perpetual injunction should be awarded, and the bond should be delivered up to be cancelled.

1851.

Morin
v.
Wilkinson.
Judgment.

There is, I think, authority sufficient to award the plaintiffs their costs, under such circumstances; and the other facts of the case, as they appear from the pleadings and admissions, do not seem to me sufficient to rebut this *prima facie* right.

IN REVIEW.

RE LANGSTAFFE, A BANKRUPT.

Surplus—Interest.

Where the estate of a bankrupt is sufficient to pay twenty shillings in the pound, and a surplus still remains, interest must be allowed on all debts proved under the commission, where the debt, by express contract or statutory enactment bears interest, or where a contract to pay it is to be implied, before the surplus is handed over to the bankrupt, but on no other debts will interest be allowed.

Dec. 3, 1850,
and
Mar. 21, 1851

A petition in this matter had been presented to the commissioner of bankrupts for the county of York, by *John Robertson* and *Duncan Macdonell*, setting forth, amongst other things, the issuing of a commission of bankruptcy, and the choice of the petitioners as assignees; proof of debts to the amount of 2000*l.*; the payment of a dividend thereon of 11*s.* 4*d.* in the pound, which swallowed up all the funds in their hands; that a valuable freehold estate had lately become vested in the petitioners as such assignees; and that the same was more than sufficient to pay the debts proved in full, and all interest thereon. The petition further stated, that the petitioners were desirous not to sell more of the said real estate than was sufficient to pay the debts, and such interest in respect thereof as the commissioner should direct; that the bankrupt denied the right of the petitioners to apply the estate towards payment of interest on the debts proved beyond the date of the commission;

1850. *Re*
Langstaffe,
a bankrupt.

Statement. and that the petitioners considered it for the interest of the estate and necessary for their own protection to present the petition; and they thereby prayed that the said commissioner should order that the said debts, or so much thereof as bore interest at common law, should be payable under the said commission, with interest until the day of payment, there being an abundant surplus for that purpose; and that the payment of 11s. 4d. therefore made should be declared to have been made in the first place on account of the interest then due, and the residue on account of the principal; and that the balance of principal and interest remaining unsatisfied should be computed accordingly.

Upon this petition coming on to be heard, the commissioner ordered that it should be dismissed, on the ground that although, under the circumstances of the case, interest would be payable in England, yet as the language of the statute of bankruptcy in this province greatly differs from that used in the English statutes, there was no authority in this province for giving interest beyond the date of the commission.*

From this decision of the commissioner the petitioners appealed to this court; and on the petition coming on for argument,

Argument. Dr. Conner, Q. C., and Mr. McDonald for the assignees, cited *Bromley v. Goodere* (a) in support of the view that the bankrupt's estate was liable for interest accrued due after the date of the commission, where there was a surplus in the hands of the assignee. In that case the question first arose. In *Bower v. Marria* (b), which is the last case reported on the point, the decision came to in *Bromley v. Goodere* is highly spoken of; and the decision in the case in

(a) 1 Atk. 75. (b) 1 Cr. & Ph. 351.

* Note.—It is understood that an appeal was contemplated by either party; and it was arranged, therefore, that the above judgment should be given.

Craig and Philips, establishes that payments in 1850. bankruptcy would be applied in the first place to keeping down interest. They cited also *Exp. Morris* ^{Re Langstaffe, a bankrupt,} (*a*), *Exp. Clarke* (*b*), *Exp. Boardman* (*c*), *Ackerman v. Ehrensperger* (*d*), *Pott v. Weatherby* (*e*).

It is clear costs at law are recoverable in bankruptcy if verdict has been obtained before the date of the commission. The 7th section of our bankrupt act is the only clause that can afford any ground for contending that creditors are not entitled to the full benefit of interest in case of a surplus, after payment of the principal sums proved; but the words there, they submitted, were not sufficient to deprive parties of this right (*f*).

Mr. *J. Duggan* for the bankrupt—The principal ground of all the decisions in England is, that interest was secured by the contract; and in no case was it ever given on mere simple contract debts not carrying interest. Mr. *Eden* and Mr. *Archbold* in their treatises, as indeed all the text writers, lay the rule down, as is contended for by the bankrupt, that interest will not be paid after the date of the commission. He also referred to *Exp. Shepard* (*g*) as an authority on the point.

In *Exp. Cocks* (*h*), the note was made payable on demand, and yet interest out of the surplus was refused.

He also referred to and commented on the 35th and 59th sections of the bankrupt act of this province.

(*a*) 1 Ves. Jun. 132. (*b*) 4 Ves. 677. (*c*) 1 Cox. 275. (*d*) 16 M. & G. 181. (*e*) 7 M. & G. 604.

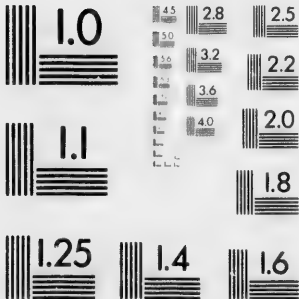
(*f*) The 75th sec. of 7 Vic. ch. 10, enacts, "That in all questions not otherwise provided for, the laws of Upper Canada and of Lower Canada respectively shall be resorted to as the rule of decision in all questions respecting bankrupts, as the laws now respectively obtain in each section of the province; and in cases unprovided for in the existing laws above mentioned, then resort shall be had to the laws of England, as such rule of decision in that part of this province heretofore Upper Canada, and that only."

(*g*) M. & McA. 67. (*h*) 1 Rose 317.



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1851. *ESTEN, V. C.**—In this case a commission of bankruptcy was issued against *Miles Langstaffe* on the 2nd of August 1845, under which the petitioners were appointed assignees. Debts to the amount of 2000*l.* were proved under the commission, and they are supposed to compromise all the debts that were proveable under it. A dividend of 11*s.* 4*d.* in the pound on these debts was declared on the 12th of April 1848, and has since been paid. No other dividend has been declared, and the effects then realized were not more than sufficient to pay that dividend and the expenses of the commission. The assignees have not received any further monies belonging to the estate, but a valuable reversionary interest in lands, part of the estate at the date of the commission, has since fallen into possession and become applicable to the payment of the residue of the debts. An order has been made in the court below for the sale of this interest, and it is stated to be more than sufficient for the satisfaction of the debts proved in full, and all interest which has, or, but for the bankruptcy, would have become due in respect of them. The bankrupt denies the right of the assignees to apply any part of the proceeds of this estate to the payment of interest accrued or claimed from the date of the commission; and the question which I have to consider is, whether or not such interest is payable before the surplus of the property is paid or conveyed to the bankrupt. The appeal appears to be a friendly one, and the petition has been presented in order to obtain the opinion of the court upon the point in dispute. I presume, but it is not stated, that the bankrupt has obtained his certificate, and that it has been duly confirmed. The question then for my consideration is whether, where a bankrupt's estate has paid 20*s.* in the pound on the amount proved under the commission, and is sufficient to pay interest on that amount, such interest or any part of it is payable;

Mar. 21, 1851

Judgment.

(a) The Chancellor was concerned in the case while at the bar.

or whether the surplus must be transferred to the 1851.
bankrupt after payment simply of the amount proved.

*His
Langstaffe,
a bankrupt.*

I would premise that reason and justice are all in favor of the claim of interest. Where there is a surplus, the bankruptcy is more nominal than real. The party has merely gone through the form of a bankruptcy, and if interest after the date of the commission is not indeed payable, it would have been in the power of any trader, although perfectly solvent, by making himself a bankrupt, to avoid the payment of interest on debts of which he had thereby delayed the recovery. However, if the law is against such a claim, it must be enforced, whatever may be the consequence. The question turns on the construction of the bankrupt act of this province; which was a new and positive enactment, and must govern all questions arising under it by its own express provisions, interpreted according to general principles of construction, and with reference to the circumstances Judgment under which it was introduced, so far as we are at liberty to take them into consideration. It will be useful to attend to the bankrupt law in England from the introduction of that system until the passing of our own act. For this purpose I have examined all the bankrupt acts which have been made in England, from the 34 & 35 Henry VIII. c. 4, to the Bankrupt Consolidation Act, passed I believe in the year 1848. The 34 & 35 Henry VIII. c. 4, left the bankrupt liable to the residue of his debts not paid under his bankruptcy. The 13 Elizabeth c. 7, and 1 Jac. I. c. 15, did the same; and these two statutes provided that, after payment of all expenses and the debts proved, the surplus should be restored to the bankrupt. This is in effect the same provision as is contained in our own bankrupt act, and would have equally followed from general principles of law had no express provision on the subject been introduced at all. In this state the law upon this point continued

1851. in England until the passing of the 6 George IV. c. 16, for none of the intermediate statutes contained any provision regarding the surplus. The question as to what was to be done with a surplus of a bankrupt's estate came before Lord *Hardwicke* in *Bromley v. Goodere*, and that great judge held very clearly, that the bankrupt could have no part of his estate until full satisfaction of all principle and interest of the debts proved under the commission to the time of payment. It is true that in this process much debt, as Lord *Eldon* expresses it, which has not in terms been proved—namely interest—accrued after the date of the commission, is paid under it; but this difficulty is obviated by the principle, that the interest of the debt is an integral portion of the debt itself, and is in fact proved under the commission when the principal of the debt is proved. It appears also, from the striking exposition of the law given by Lord *Cottenham* in the case of *Bower v. Marris*, that this subsequent interest is in fact paid before the principal, and that the balance of the debt which remains due after the receipt of a dividend under the commission, is not interest but principal, and has in fact been expressly proved under the commission. In that case, one of two joint obligors had become bankrupt, and under the commission against him the obligee received twenty shillings in the pound on the amount proved. The residue was claimed against the estate of the co-obligor in a suit instituted in the Court of Chancery for the administration of that estate; and the question was as to the appropriation of the dividend which had been paid in the bankruptcy. It was contended in favor of the estate of the co-obligor, that the dividends consisted of so many shillings in every pound of the amount proved, and to that extent discharged the principal and interest of that amount; consequently, that interest on the principal discharged by that process ought from that time to cease, and the estate of the co-obligor ought to

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be relieved from so much of the debt—in other words, that the estate of one co-obligor was to be benefited by the bankruptcy of the other, in being relieved from a portion of the interest on the debt—namely, that which would otherwise have accrued from the date of the commission; but Lord *Cottenham* held very clearly that there was no such appropriation as was contended for; that the proof of the principal and interest due at the date of the commission was merely an arrangement for the purpose of ascertaining how much every creditor was to receive in the event of a deficiency; that the debt continued, notwithstanding the bankruptcy, although the debtor was discharged personally from it, and yielded interest as before; and that the dividends were applicable in precisely the same manner as so many payments would have been without any bankruptcy—namely, first in discharging interest, and then in sinking principal: the consequence of which was, that the principal remained due and carried interest, and that the balance of the debt remaining due consisted of principal and not of interest. The same effect is elucidated by what takes place in bankruptcy, when twenty shillings in the pound has been paid on the amount proved, and there is a surplus; for unless the appropriation which has been described took place, the whole principal would be discharged at the date of the payment of the last dividend, and from that time interest ought to cease altogether, whereas it is calculated up to the time of payment on so much of the principal as, according to the mode of appropriation before mentioned, from time to time remains due. Upon these principles, the construction put upon the old statutes, which have been mentioned, would have been the same, although the bankrupt had been personally discharged by them from the debts proved under the commission; but the intent with which they were passed in this respect is rendered manifest by the

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fact that the bankrupt under these statutes continued liable for the debts proved after the bankruptcy, and therefore it would have been useless to have returned to him any part of this estate until full satisfaction of the principal and interest of these debts, since the result would have been that the residue unpaid would have been recovered from him by action, and the sole effect of such a mode of proceeding would have been an useless circuitry. The expression "full satisfaction" which occurs in the 1 Jac. 1. c. 15, and upon which so much stress was laid in the argument, is merely indicative of the intent with which those acts were made, and which was abundantly manifest independently of that expression. The correctness of Lord *Cottenham's* exposition of the law is evinced by the nature of the provisions contained in the old bankrupt acts, to which reference has been made. It was obviously the intent of these acts, that by virtue of the commission and the remedy reserved against the debtor, the creditor should receive full satisfaction in the same way as if no bankruptcy had occurred; which would not have been the case, however, had the payments under the commission received a different appropriation from what would have been made without the bankruptcy; for in this event the creditor would have been deprived of the interest which would otherwise have accrued upon principal then remaining undischarged, but by this process paid before interest. It was absolutely necessary, in order to accomplish the intent of the legislature, that the debt should continue in the same plight after the bankruptcy as before, and should yield interest in the same way, and that the payments under the bankruptcy should be applicable firstly in discharge of interest and then in sinking principal; the consequence of which was, that the proof of the principal and interest then due under the commission was, as I before suggested, merely matter of arrangement for the purpose of ascertaining the amount payable to each

creditor in the event of a deficiency. The bankrupt was first discharged from the debts proved under the commission by the 4 & 5 Anne, c. 17. This statute had been passed and was in force when *Bromley v. Goodere* was decided. Lord *Hardwicke* held that by force of this provision the bankrupt was personally discharged from the debts proved under the commission, and *ex consequentiâ*, that his after-acquired property was equally exempt from them; but that the disposition and liability of the fund which was brought into court for the satisfaction of the debts proved under the commission—that is, the whole estate of the bankrupt at the date of the commission—was not affected by it. The consequence was, that after the bankrupt was discharged from the debts proved under the commission, equally as when he continued liable for those debts after his bankruptcy, the fund in court was applicable as far as it would go to the satisfaction of those debts, and the bankrupt could receive no part of it until they were completely satisfied. The law continued in this state until the passing of the 6 George IV. c. 16; and the rule, which had prevailed in bankruptcy with regard to the surplus, was recognized and extended by that statute; which provided by its 132nd section that the surplus should not be handed to the bankrupt until interest after the date of the commission should be paid on all debts upon which by law interest was then payable in case of a surplus, at the rate expressly reserved or by law then payable, and on all other debts at the rate of four per cent. The Bankrupt Consolidation Act already mentioned, enabled the creditor to prove interest to the date of the commission at the rate of four per cent. on all debts and sums certain not carrying interest, from the time of payment or from demand, as the case might be.

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Under the circumstances which I have detailed, our own bankrupt act was passed in the year 1843,

1851. at which time the last English bankrupt act had not been passed. I have already mentioned that the rule which prevailed in England in regard to the surplus previously to the 6th George IV. ch. 16, was, that after payment of all expenses and charges, and the debts proved under the commission, the surplus should be handed to the bankrupt. The 6 George IV. ch. 16, imposed a further charge upon the estate: it authorized the additional deduction of interest at the rate of four per cent. on debts not by law carrying interest, from the date of the commission. It is not easy to account for our own legislature not having adopted this provision either in terms or in substance; for nothing can be more just than that a bankrupt estate should pay interest on all debts of every description whatsoever, before the bankrupt himself should be allowed to receive any part of it. The omission is the more extraordinary, as the same legislature had previously enabled juries in their discretion to award interest in the shape of damages on debts and sums certain, not by law carrying interest, from the time of payment or demand, as the case might be; and it is certain that, substantially, in every case where a bankruptcy has occurred, the delay of payment has been owing to the default of the debtor and the operation of the bankruptcy itself. Whatever the reason was, however, which influenced our legislature in rejecting this provision of the 6th Geo. IV. ch. 16, so far as it related to debts not by law carrying interest, I think they did so, and adopted in preference the rule which existed in England in this respect previously to the passing of that statute—namely, that the surplus should be handed to the bankrupt after payment of all expenses and charges, and of the debts proved under the commission. This is the effect of the 67th section of our Provincial Bankrupt Act, and is virtually the same rule as prevailed in England on the same subject previously to the passing of the 6th Geo. IV. ch. 16. Now, there

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is no doubt that the whole of our bankrupt act was 1851.
 borrowed from the bankrupt law of England; and
 the law of Upper Canada, which is substantially the
 law of England, and the law of England itself, are
 expressly invoked and appealed to by our bankrupt
 statute, for the purpose of regulating and determining
 any matters not expressly provided for by it. Under
 such circumstances, I cannot for a moment hesitate
 to put upon a provision contained in our own bank-
 rupt act the same interpretation as the same provision
 in the English bankrupt law always received in
 England up to the passing of the 6th Geo. IV. ch. 16,
 which was recognized and extended by that statute,
 and which is moreover strictly consonant to the dic-
 tates of natural justice and reason. I hold, there-
 fore, very clearly, that what occurs in England has
 occurred here in bankruptcy—that all the property
 belonging to the bankrupt at the date of the commis-
 sion is taken from him and placed in court for the
 satisfaction of all debts then owing by him; that he
 is personally discharged from these debts, and by
 consequence that his future property is equally
 exempt from them; but that the fund in court is
 liable to their satisfaction as far as it will go; that
 the creditors are required to prove the amount due to
 them at the date of the commission, on the supposi-
 tion that the estate is deficient, and for the mere pur-
 pose of ascertaining what each is to receive; that the
 debts, however, continue in the same plight, and bear
 interest as before; and that the appropriation of the
 monies received under the commission is the same
 as would have taken place had there been no bank-
 ruptcy—namely, first in discharge of interest, and
 then in sinking principal—the result of which is, that
 when the dividends paid under the bankruptcy have
 not been sufficient to discharge the whole debt, the
 balance remaining unpaid is principal, and not in-
 terest. I also consider, on the principle of the law
 both of Upper Canada and of England, that the

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1851. interest of a debt carrying interest is part of the debt itself, and is virtually proved under the commission, when the debts itself is proved. If we apply these principles to the case before us, we shall find that the only question we have to ask ourselves is, whether or not the debts proved under the commission have been paid. It was contended in the argument that the 132nd section of the 6th Geo. IV. ch. 16, was introduced into this part of the province by the 75th clause of our own bankrupt act. It may be gathered from what I have said that I have arrived at a different conclusion; I confess, with reluctance. Nothing, I think, is more just than that a bankrupt's estate shall be chargeable with interest on all his debts, before any part of it is restored to him. I think, however, that this construction is precluded by the language of the 67th clause of our act, which limits the deduction from the estate before its restoration to the bankrupt to the debts proved. Now, where the debts does not, by force of any express or implied contract, carry interest, or interest has not by express statutory provision been incorporated with it, but a jury only may award interest if they in their discretion think fit, such interest cannot, I think, by any fair process of reasoning, be considered any part of the debt itself, within the intent of that principle of English law which identifies interest due by force of contract express or implied with the debt out of which it grows. It is quite uncertain at the time of the bankruptcy, where no action has been brought for the recovery of such debts, whether interest would have been awarded in respect of them or not. The jury is not obliged to award such interest, and it appears from the case of *Arnott v. Redfern* (a), that they ought not to do so, where there has been negligence in demanding or recovering payment of the debt. For these reasons, I do not consider that interest, not arising by force of any contract

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(a) 3 Bing. 352.

express or implied, but merely capable of being 1851.
 awarded in their discretion by a jury, as a debt
 proveable under the commission, or as part of any ^{Re}
 debt proved under the commission, so as to be ^{Langstaffe,}
 chargeable on the bankrupt's estate before the over-
 plus of it is handed to the bankrupt. But wherever
 there has been an express contract to pay interest,
 or an implied contract to the same effect, as from the
 custom of trade or course of dealing, or other cir-
 cumstances from which the law implies a contract
 to pay interest; or wherever an express statutory
 enactment has given interest *eo nomine* and at all
 events, and not to be awarded by a jury in their dis-
 cretion, but has incorporated it with the original
 debt, as on protested bills and notes under 51 Geo.
 III. c. 9, sec. 4; and upon judgments under the 2nd
 Geo. IV. c. 1, sec. 9; I think that the interest ought
 upon general principles of law to be considered part
 of the original debt in respect of which it accrues
 and that such debt when proved under a commission ^{Judgment}
 of bankruptcy is not paid within the meaning of the
 67th clause of the bankrupt act, until the whole of
 it, both principle and interest, has been paid; and I
 consider further, as I have already observed in
 respect of such debts and the interest arising from
 them, whether before or after the bankruptcy, that
 the dividends received under the bankruptcy are
 appropriated by the law in the same way as they
 would have been had there been no bankruptcy at
 all—that is to say, first in discharging interest, and
 then in sinking principle; and that any balance
 which such dividend may be insufficient to pay, and
 which may consequently remain unpaid, is in fact
 principle and not interest, and has been in terms
 proved under the commission, and will of course
 carry interest until paid. These general observa-
 tions will probably be sufficient for the purposes of
 this petition. I think the learned judge of the
 court was wrong in dismissing the petition presented

1851. ^{Re} ~~Langstaffe,~~ ^{a bankrupt.} to him for the allowance of interest, so far as regards debts of the nature I have described, and such that interest ought to be allowed. The petition of appeal or any of the proceedings in the bankruptcy, do not shew of what nature or description the debts in the case are, but my opinion was desired by both parties on the abstract question, and I think I have expressed it in such a way as to accomplish the object of the appeal. The costs must of course come out of the estate.

Judgment.

Order. That the account of the Bankrupt's Estate be referred back to the Judge of the County Court of the County of York; and if the said Judge shall find that there is any residue or surplus remaining in the hands of the Assignees after paying twenty shillings in the pound to all the creditors. It is further ordered, that the said Judge do compute interest on all debts where there has been an express contract to pay interest or an implied contract to the same effect as from the custom of trade or course of dealing, or other circumstances from which the law implies a contract to pay interest, or wherever an express statutory enactment has given interest *eo nomine*, and at all events, and not to be awarded by a jury in their discretion, but has incorporated it with the original debt; as on protested bills and notes under 51 George III. chapter 9, section 4, and upon judgments under 2 George IV. chapter 1, section 9 (but not on bonds beyond the penalties thereof), and upon other contracts or notes carrying interest, the interest at the rate therein specified; and where no particular interest is specified, at the rate of six per centum per annum until the creditors receive full satisfaction. Costs to be paid out of the estate, etc.

CHISHOLM V. SHELDON.

Equity of redemption—Term for years—Evidence—Adding plaintiffs after examination of witnesses—proof of deeds.

March 14
and
April 11th *Quære*—Whether a sale by the sheriff, under a *fi. fa.* against lands, of the reversion, after a term of 1000 years had been created by way of mortgage, carries with it the right to redeem the term.

Where a bill is amended by adding parties plaintiff, the dispositions of witnesses who had been previously examined in the cause may be read at the hearing.

Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause, under the deed so produced, the party calling for its production is not bound to prove its execution.

The facts of this case are so fully set forth in the former reports of it (ante vol. 1, pp. 108, 264, 318,

425), that any further statement here is unnecessary : 1851.
 The points mainly relied on by counsel were those ^{Chisholm}
 taken on the former hearing. ^{Sheldon.}

The other points of the case are fully stated in the ^{Statement}
 judgment of the Court.

Mr. *Brough* and Mr. *Mowat* for the plaintiffs.

Mr. *Vankoughnet*, Q. C., for defendant *Tiffany*. ^{Argument}

Mr. *Turner* for the defendants *Sheldon* and *Smith*.

Downe v. Morris (a) and *Doe Jarvis v. Cum-*
mings (b), were cited in addition to the cases formerly
 relied on.

* THE CHANCELLOR.—Upon the former hearing of this ^{April 11.}
 cause, it was ordered to stand over, with liberty to the ^{Judgment;}
 plaintiffs to amend by adding parties plaintiff or
 defendant, and also to exhibit an interrogatory to
 prove the will of the testator. Two formal objections
 are now urged; first, that the evidence taken prior
 to the amendment cannot be received in the altered
 state of the record; and secondly, that the plaintiffs
 cannot proceed without production of the mortgage
 deed.

The practice in relation to amendments, under
 orders made at the hearing, is in some respects
 obscure; some of the rules to be found in text writers
 of character seem to me to be inconsistent with
 reason and authority; but the question here raised,
 is in my opinion, free from doubt. It is said that
 the amended record is different from the original, and
 that the evidence taken upon the original record can-
 not consequently be received, inasmuch as the wit-
 nesses could not be prosecuted for perjury; and the

(a) 3 Hare 394. (b) 4 U. C. Q. B. R. 390.

1851. observation of *Lord Cottenham* in *Milligan v. Mitchell* (a) is cited as in point.

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The evidence tendered by the plaintiffs was regularly taken in the original cause. All the defendants either cross examined or had the opportunity of cross examining them; and the plaintiffs who were added under the order consent to be bound by the evidence. What possible objection can there be to its reception? Had the plaintiffs amended by adding parties defendant, it is obvious that, against *them*, the plaintiffs could not have used evidence taken before they were parties to the record, and when they had, consequently, no opportunity to cross examine; still, even then, such evidence would have been receivable, I apprehend, against the *old* defendants. No such difficulty arises under the present circumstances. The new parties seek to avail themselves of evidence regularly taken against all the defendants; and I have no doubt that they have a right to do so. If the language attributed to *Lord Cottenham* is to be understood as intimating a doubt of the possibility of indicting witnesses for perjury, after an alteration of the record by the addition of parties plaintiff, I must confess myself unable to understand the ground of his lordship's doubt. The evidence having been regularly taken, can the criminal responsibility of the witnesses be affected by such an alteration of the record? But if such were his lordship's meaning, he must have subsequently altered his opinion, because, the evidence taken on the original record in that very case, was used at the subsequent hearing, upon the amended bill, and a decree pronounced upon it (b); and the same course has been since adopted on several occasions (c).

Judgment.

(a) 1 M. & C. 443. (b) 3 M. & C. 72. (c) *Giles v. Giles*, 1 Keen. 685; *Willats v. Busby*, 3 Beav. 420.

With respect to the objection on account of the non-production of the mortgage deed at the hearing, the matter stands thus: *Tiffany* admits the deed stated in the bill, *without reference*. The other defendants admit the deed *with a reference*, though in a peculiar form (a); but they do not admit possession. No objection was made by *Tiffany* at the hearing; but the other defendants objected to the plaintiffs proceeding without the deed, which was produced by the defendants subject to the objection. It may be stated, I believe, as a general rule, that where an instrument is produced upon notice, by an adverse party, who claims an interest in the cause under such instrument, there the party calling for its production is not bound to prove its execution (b). In a recent case (c) Chief Justice *Tindal* stated the rule thus: "Where land is claimed by one party under a deed—the land being the subject of the action—and such party produces the deed under notice, he cannot compel the opposite party to produce the attesting witness or prove the execution." Judgment.

Now, with reference to the peculiar deed in question here, Sir *James Wigram* recently observed—"Now I believe that no point is better settled than this,—that where a mortgagor is proceeding against his mortgagee, a court of equity will not compel a mortgagee to produce his securities, except on payment of the mortgagee's claim" (d).

Then, as to the form of the answers: It is quite clear that the production of the mortgage security

(a) The defendant *Sheldon*, in his answer to the original bill, after stating shortly the contents of the mortgage deed, referred to it thus:—"As by the said indenture, &c., on reference thereunto may appear; but this defendant is not in possession of the same indenture, &c., and cannot, save as aforesaid, set forth the purport or effect of the same indenture, &c.," the defendant *Smith* answered and referred to the mortgage deed in the same way.

(b) *Pearce v. Hooper*, 3 Taut 60. (c) *Rearden v. Minter*, 5 M. & G. 204. (d) *Bentinck v. Willink*, 2 Hare 8; and see *Brown v. Lockhart*, 10 Sim. 425; *Greenwood v. Rothwell*, 7 Beav. 291.

1851. *Chisholm v. Sheldon.* would not have been ordered against *Tiffany*: his admission is without reference, and he denies possession. As to the other defendants, the reference is not in the usual form. But, assuming it to be sufficient to incorporate the deed, as perhaps it is (a), still the defendants do not admit possession, and, without such an admission, production will not, as a general rule, be ordered (b).

Upon examining the answers, however, I find that the facts are not as I understood them to have been represented at the hearing. The mortgage deed is sworn by *Tiffany* to be in possession of the parties now objecting to its production. Under these circumstances, there is, in my opinion, no room for the objection (c).

Judgment. But the discussion upon the present, as also upon the former occasion, turned principally upon the effect of the deed of the 14th of January, 1845; the one side insisting that the instrument in question operated as a conveyance to *Tiffany* of the reversion in fee, and with it the equity of the redemption of the term; while the other side contended that it was wholly inoperative—or, if operative at all, that it only conveyed the reversion in fee, leaving the equity of the redemption of the term in the devisees. The learned counsel for the defendants—admitting that the reversion in fee might have been severed from the equity of redemption of the term, either by the testator or his devisees, and that those interests would have thenceforward subsisted separately—argued, that, inasmuch as that course had not been pursued, the sheriff's deed had, necessarily, the effect of passing to *Tiffany* the equity of redemption of the term (a right inherent in the re-

(a) *Wilford v. Stainthorpe*, 2 Beav. 587. (b) *Darwin v. Clarke*, 8 Ves. 158; *Hardman v. Ellames*, 2 M. & K. 732; *Princess of Wales v. Earl Liverpool*, 1 Swan 121. (c) *Owen v. Jones*, 2 Anst. 505.

version), in the same way as that interest would have descended to the heir, passed under a general devise, or reverted to the lord by escheat. *Pawlett v. Attorney General*, *Burgess v. Wheate*, and *Lord v. Morris*, were cited as in point. And, in answer to the argument that an equity of redemption is not saleable under common law process, it was said, that, here, the equity of redemption of the term had not been sold; the reversion only had been sold, it was said, and the equity of redemption, as inherent in, and a part thereof, had necessarily passed by the conveyance.

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Without repeating the observations made on a former occasion, I may state briefly, that the opinion then expressed was formed upon this short view of the case. The owner of the fee had carved out of the inheritance a term for 1000 years, by way of mortgage; but, long prior to the deed of January 1845, the title of the termor had become absolute at law, and he had recovered possession by action of ejectment. I regarded the estate as then distributed in this way: the reversion, of course, in the tenant of the fee simple, but the ownership of the term divided; a legal title become absolute in the mortgagee, but an equitable title still left in the mortgagor. I cited, as furnishing a sufficiently accurate definition of the mortgagor's estate for the present purpose, the observation of Mr. *Coventry*, that "there is a distinction between the reversion expectant upon a mortgage for years, and the equity of redemption which resides in the mortgagor as a separate right or title from that of the right to the reversion." And considering it competent to the mortgagor at any moment, and for any purpose of his own, to deal with the legal and equitable interests thus vested in him as distinct—devising (a), selling, incumbering

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(a) *Amhurst v. Litton*, Fitz. 99.

1851. them at his pleasure, as separate estates—and looking to the construction placed by the Court of Queen's Bench of this province upon the imperial statute 5 Geo. II. c. 7, the operation of the deed of January 1845, seemed to me to be free from all doubt. The propositions advanced by the learned counsel on both sides appeared to me to be untenable. I was unable, on the one hand, to discover any principle upon which to hold that the reversion in fee, liable *prima facie*, to be sold under common law process, by virtue of the statute 5 George II., had been withdrawn from the operation of that process, because of the tenant of the fee simple, having in him, at the time of the sale, the equitable estate in the term, in his character of mortgagor, as well as the reversion in fee; and I could not, on the other hand, perceive how a compulsory sale of the reversion, under common law process, could be held to carry with it the equitable title in the term, an interest clearly separable from the legal estate, and as clearly excepted from the operation of such process. I concluded therefore, that the deed had passed that which the statute of Geo. II. had authorized to be sold—the reversion in fee,—but had left still in the mortgagor the estate which that statute had not authorized to be so sold—the equity of redemption of the term.

Judgment.

Such were the grounds of the opinion I then formed; and, before proceeding to consider the arguments adverse to that opinion, which were addressed to us upon the present occasion, I must beg leave to thank the learned counsel engaged in the cause for the zeal and ability with which they discharged their duty. After full discussion at the bar, and consideration from the bench, causes are often presented in lights previously undiscovered; broader and deeper views suggest themselves, sufficient, frequently, to solve the most pressing doubts. In that respect I have always thought the practice of rehearing causes

pursued in this court, to be an institution of the greatest value in the administration of justice; and if, in the present case, I shall have unfortunately failed to discover the truth, that failure will not, most certainly, have arisen from any indisposition to avail myself of that opportunity of reconsideration, which I esteem to be a great privilege.

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I am by no means satisfied that any additional light will be thrown upon this subject, by a metaphysical enquiry into the nature and properties of an equity of redemption. The question depends, I think upon the statute of George II., from which, the opinion I formerly expressed seems to me to result, naturally and necessarily, without the infringement of any rule of law; but, that conclusion, so far from being weakened, is, in my opinion, materially fortified by the cases so much relied upon by the defendants.

Judgment.

Upon a careful consideration of the arguments urged, and cases cited, I have been unable to discover any principle which would warrant a conclusion different from that pronounced by the court upon the former argument. The learned counsel for the defendants say, that the equity of redemption is a right inherent in the reversion, which, of necessity, passed under the sheriff's deed; they deny that this proposition is in conflict with the authorities which have determined that an equity of redemption cannot be sold under common law process, because the equity of redemption was not, they say, sold, but the reversion, to which the right of redemption was inseparably attached; and they ask upon what authority this court can deny to the sheriff's vendee an equitable right, which would have passed to the grantee of the mortgagor, and would have reverted to the lord upon escheat.

This train of reasoning involves several proposi-

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tions, no one of which, is, in my opinion, tenable. Is the equity of redemption that mere right the argument on the part of the defendants would imply, which, though not exposed to sale, and indeed not liable to sale under common law process, must be held to have passed under the sheriff's deed, as inherent in the reversion? The cases cited directly negative that proposition. In *Pawlett v. the Attorney-General*, (a) the title was circumstanced as in the present case. The owner in fee had created a long mortgage term, which, upon the attainder of the mortgagee, had been seized for the use of the crown; and it was there contended, that the equity of redemption, being a mere equitable right in the nature of a trust, could not be enforced against the crown. But *Lord Hale*, said, an equity of redemption is not a mere trust but a "title in equity," and again, "a power of redemption is an equitable right, inherent in the land, and binds all persons in the post or otherwise." *Lord Hardwicke*, said, in *Casborne v. Scarfe*, (b) "an equity redemption has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore, cannot be considered as a mere right only, but such an estate whereof there may be seizin." In *Burgess v. Wheate* (c), the question was whether upon the death of *cestui qui trust* without heirs, the crown had an equitable title to a conveyance from the trustee. Now, had an equity of redemption been a mere trust, *Pawlett v. the Attorney-General* would have been an authority in favour of the crown; but *Sir Thomas Clarke* expressly affirmed the distinction, and relied upon the language of *Lord Hale* which I have just cited.

Then, assuming the equity of redemption to be an

(a) Hard. 467. (b) 1 Atk. 604, (c) 1 W. B. 145.

estate in the land, it is said to be an estate inherent in the reversion. If this mode of expression be intended to describe the equitable estate as residing in the reversion in such a way as to render the sale of the latter, without passing the former, impossible, then the argument proceeds, I apprehend, upon a misconception. The equity of redemption, in that view, may be said to be inherent in the term, more properly than in the reversion. Courts of law regard the mortgage term as a term in gross; the reversion and term, are, in their consideration, perfectly distinct estates. In equity, the reversion never was affected by the mortgage; the whole legal and equitable interest therein—as at law—remained from the first in the reversioner. But, as to the term, the effect of the transaction was, to separate the legal from the equitable estate—the legal estate being in the mortgagee, but the equitable in the mortgagor. To illustrate this point, suppose the mortgagor to have been himself but a termor, and to have assigned his whole term, by way of mortgage; would there not have been in that case an equity of redemption? would there not have been an equity inherent in the land? In what? the reversion? no, but in the term? and such an interest, clearly, would not have been saleable under common law process. Or, assume the mortgagor to have been but a termor at the time of the mortgage, and to have subsequently purchased the reversion in fee, would that accidental acquisition of the inheritance have altered the character or incidents of the prior equitable estate? would he not have held the equitable estate in his character of mortgagor, and the reversion as tenant of the fee simple? would the equitable estate, clearly unsaleable under common law process prior to the acquisition of the reversion, have become saleable in consequence of such acquisition? I apprehend not. Is the present case different in principle? *Pawlett v. the Attorney General* is in conformity with this view

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of the law. There the interest of the mortgage—the term—had escheated to the crown; and the contention was that the court was bound to regard all merely equitable interests as having failed, and to govern itself by the dry legal rights of the parties; *Lord Hale*, however, determined that an equity of redemption was not a mere equitable right, but an estate in the land, binding those in the post, and therefore to be enforced by subpcena, as binding the legal estate in the term, which had escheated to the crown.

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But *Lord Downe v. Morris* (a), a case much pressed by the learned counsel for the defendants, appears to me to negative directly their whole argument. Upon the view urged here, much of the reasoning of the learned Vice-Chancellor, in that case, would have been out of place. But, so far is that learned judge from considering the equity of redemption of the term as a right inherent in the reversion, and necessarily passing with it, that he sets out by proving it to be, not a right, but an estate in the land; he next reasons that every portion of the original grant remaining in the tenant at the time of his death, would revert to the lord; and his conclusion is that the equity of redemption, as a portion of the original grant, unaliened at the tenant's death, had reverted to the lord, and might, therefore, be enforced by subpcena in equity. The reasoning throughout the whole judgment appears to me wholly irreconcilable with the arguments urged upon the present occasion. *Sir James Wigram*, having cited *Lord Hale*, *Lord Nottingham*, *Lord Hardwicke*, and *Lord Eldon*, to establish the proposition that an equity of redemption is an estate in the land, proceeds thus: (b) "But notwithstanding those large powers of alienation, whatever portion of the original grant

(a) 3 Hare, 394. (b) Page 407.

the tenant retains at the time of his death without heirs, that the lord may claim by escheat. I do not include possibilities or conditions strictly so called or rights of action which could not be granted. But, as a general proposition, whatever estate or benefit the tenant retains which would have passed to his heirs, if he had any, and which could be the subject of grant, that the lord by escheat may claim. Where the tenant retains any parcel of the specific subject of the original grant, the right of the lord requires no circumlocution to define it; he takes it strictly as an escheat." Then he draws his conclusion: "Now, an equity of redemption is in all respects an interest of the nature of those which at law would pass to the lord by escheat; it is an estate or interest in the land, reserved or retained by the tenant, vested in him at the time of his death without heir, which would descend to his heir if he had one, and which may be the subject of grant." And again (a), "The equity of redemption is an estate in the land not alienated." Judgment. And, in order to distinguish the case before him from *Burgess v. Wheate*, he says, "It is one thing to say that when the tenant has aliened his whole estate at law, and thereby ceased to be a tenant, there shall be no escheat on his death without heirs; and another to say, that the lord taking lands by escheat is bound by an alienation of the tenant for a term of years further or otherwise than the tenant himself was bound.

Before proceeding to the next branch of the argument it may be useful to advert to the construction placed upon the statute 5th George II. in relation to the present question; in doing which I shall content myself with quoting the language of the learned Chief Justice of the province, in the case of *Simpson v. Smyth* (b). His lordship observes, "And, indeed, the reason why an equity of redemption should not be liable to be sold under a *fi. fa.* (c) seem so strong

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(a) Page 408. (b) 3 U. C. Rep. 130. (c) Page 160.

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as to be almost irresistible." Again: "But this only shews the more clearly, that it is in equity alone that the remedy can be properly and conveniently sought, with safety to the claims and interests of all parties. A purchaser of an equity of redemption under a *fi. fa.* attended as the right is with equities of a peculiar kind, arising from circumstances which neither he nor the sheriff can know, and over which the court of law issuing the process can have had no control, would be in a most unsatisfactory position; and it would be highly to the prejudice of the mortgagor that his equitable estate should be forced from him under a legal process, at the price that a stranger might think it prudent to give for it under such disadvantage." Lastly: "In the view of a court of law an equity of redemption is nothing '*belonging to*' the debtor which it can recognize, or is authorized to deal with, for the law looks only to the legal estate. In the view of equity it is an interest, and one to which it can give effect, and in such a manner as to suit the just claims of all; and therefore, when the same act, after making real estates liable for the payment of debts, provides that they shall be 'subject to the like remedies, proceedings and process, *in any court of law or equity*, for seizing, extending, selling or disposing of them, as personal estates are subject to in the same colonies, for payment of debts" the legislature seems to have preserved the subject from confusion by sending the parties either to law or equity, according to the nature of the interest to be made liable."

Having premised so much upon the construction of the statute 5th George II., so far as it affects the present point, I come now to the question: Upon what authority the court can deny to the sheriff's vendee an equitable right which would have passed to the grantee or devisee of the reversioner, and which would have reverted to the lord upon escheat?

My answer to the argument implied in this question, is, that I am unable to discover the analogy between the present case and those which have been cited. Assuming that a grantee or devisee, claiming under a general grant or devise of the reversion, would acquire the whole interest remaining in the grantee or devisee, including the equity of redemption of the term; and assuming that the lord upon escheat, being entitled to every portion of the original grant undisposed of by his tenant, would take not only the legal estate, the reversion in fee, but also the equity of redemption of the term; I am unable to discover how it follows from such premises, that a vendee claiming, not in virtue of any disposition of the reversioner, but under an adverse sale, by an officer acting under common law process, can acquire not only the legal estate of the debtor, which has been expressly subjected to sale under such process, but also his equitable estate, which has been as Chisholm v. Sheldon. Judgment.

I can understand the principle upon which this court knits the equity of redemption to the reversion, in furtherance of right and for the purpose of effectuating the objects of the owner of the inheritance; but it would be, in my opinion, repugnant alike to reason and authority, were we to hold those estates to be so amalgamated, for the present purpose, as that either the reversion in fee must be exempt from the operation of the statute, or the equitable estate aliened through the medium of a process, by which, according to adjudged cases, equitable interests cannot be effected.

Although it be the doctrine of this court that those claiming an interest in the reversion, under the mortgagor, shall have an equivalent interest in the equity of redemption, in like manner as the beneficial interest in an attendant term will be effected by all such conveyances, assurances, or charges, as the owner creates of the inheritance; it cannot be contended, I presume, that the equity of redemption is

1850. *Chisholm v. Giddens.* knit to the inheritance more closely than the trust of a term, expressly limited to attend the inheritance; yet this court frequently, in furtherance of right dis-annexes the trust of such a term from the strict legal fee, leaving the inheritance to go one way, and the trust of the term another (a); and when the term attends the inheritance by implication of law, without any express declaration, such implication may always be rebutted by even the parol declaration of the owner of the inheritance (b). Where the inheritance is in trustees, but the owner has a term in his own name, expressly limited to attend the inheritance, and dies indebted, the term will be severed from the inheritance, and be considered assets for the payment of debts (c). Will not the same principle apply in the case of an equity of redemption? Suppose a stranger to have purchased the reversion, and suppose the mortgagee to sue the personal representative, or the heir of the testator, upon the covenant in the mortgage deed, would not the mortgagee, upon payment, be bound to assign the term to the person paying the debt? (d) Would not the term and the inheritance be then effectually severed? Or, assuming Mr. *Tiffany*, to have purchased, he might, I presume, notwithstanding such purchase, sue upon the covenant; would he not in that case be bound to assign the term, and would not the same separation ensue? (e) But the argument here is, that the equity of redemption of the term is so inseparably united to the reversion that it must be held to have passed under an adverse sale, in virtue of common law process, against the will of the parties beneficially interested; nay, long after that interest had been made the subject of proceedings in this court for equitable relief. It would be strange were this court to treat an equity of redemption with less favor than courts of

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(a) *Willoughby v. Willoughby*, 1 T. R. 70. (b) 2 Eng. V. & P. 789. (c) *Thurston v. Attorney General*, 1 Vern. 340. (d) *Burgess v. Wheate*, 1 W. B. 149. (e) *The King v. Lamb*, 13 Price, 649.

common law. They have disclaimed the idea, that such an equitable interest can be affected by common law process. They have determined that it is not within the operation of the 5th Geor. II., on account of the great inconvenience—amounting, almost, to impossibility—of so dealing with such interest. It would be anomalous, indeed, did we determine the equity of redemption to have passed under the sheriff's deed; not as an equitable estate which that officer was authorized to sell—for it is admitted that he had no such authority—but as a mere right, inherent in the legal estate, which was so subject to sale.

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It is said, however, that this term has merged in the reversion, and that there is, therefore, no longer any term to be redeemed. This argument is analogous to the former. Both seem to me to involve a *petitio principii*. If we set out with the assumption that the equity of redemption is not an equitable estate, that it is in effect nothing distinguishable from the reversion—a mere right, indiscernible from it—it becomes mere waste of time to reason upon the effect of the sheriff's deed; assuming that to be effectual for the purpose of passing the reversion, the rest follows as necessary consequence from the hypothesis: and further argument for the purpose of reconciling with the cases this proposition, that a deed executed by a sheriff, under a writ of *fi. fa* against the land of the mortgagor, has had the effect of transferring an equitable estate—the equity of redemption of the term—would be superfluous, the answer being obvious—namely, that there was no such equitable estate in existence, and consequently, no such sale of it by the sheriff.

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Upon a similar hypothesis, and in a like way of reasoning, the merger of the term, consequent upon the acquisition of the reversion by the termor, would, I presume, preclude further argument. But, if it be true that the equity of redemption of the term is an

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equitable estate; and if it be the law that an equity of redemption cannot be sold by a sheriff under common law process; then it would, in my opinion, be contrary to reason and authority to treat the merger consequent upon the acquisition of the reversion by the termor as destructive of such equitable interest. Is it not true, that, notwithstanding the merger of the particular estate, persons who have interests effecting the estate which is merged will be left in the same condition in point of benefit, as if no merger had taken place? Has it not been laid down upon high authority, with reference to an analogous question, that though the particular estate become merged, yet all estates derived out of that estate, and all charges imposed on it, and all interests created out of it by the person who was the owner thereof, shall have continuance, notwithstanding the merger of the estate on which the incumbrances were charged, or out of which they were created, in like manner as if the particular estate had continued? (a). And has not this court always interposed for the protection of equitable interests, either by decreeing possession of the lands for the term of the estate which is merged, or by decreeing a conveyance, as the circumstances of the case have required, for the purpose of administering complete and effectual justice? In *Saunders v. Bournford, Allan et al.* (b), where the residue of a term of 1000 years had been merged in the inheritance, the court decreed "that the plaintiff should hold the premises during the remainder of the term, notwithstanding the merger and that the defendant, *Isabella* should make a further assurance of the remainder of the said term." In the *Duke of Norfolk's* case (c), Chief Baron *Montague* said, "The term is gone indeed and merged in the inheritance, yet the trust of that term remains in equity; and if the trust be destroyed by him that had it assigned to him, this

(a) And see Co. Lit. 338. (b) Finch. Rep. 424. (c) 3 Cha. Ca. 15.

court has full power to set it up again, and decree the term to him to whom it did belong, or a recompense for it." In *Vincent Lee's* case (a), where a term possessed by an executor, as such, had been merged by the descent of the inheritance. *Clark, B.*, said, "that by the descent of the inheritance to the executor, the term *as to himself*, was gone; but as to the creditors, it shall be said to be *in esse*, and be assets in his hands;" and in *Brook's* Abridgment (b) there is this passage: "A man has a term as executor and purchases the freehold; the lease is extinct at law; but in equity its value is assets; for though extinct in the executor, equity would follow the interest against the executor and his representatives."

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Upon these and numerous authorities to the same purpose which might be cited, it would be, in my opinion, contrary to every principle upon which this court proceeds in relation to such matters, were we to hold the equitable estate of the plaintiff to have been affected by the merger which is said to have taken place.

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Upon the whole I am of opinion, with great distrust of my own judgment certainly, because I have the misfortune to differ from my learned brother, still I am clearly of opinion that the equity of redemption of the term did not pass under the deed of January, 1845; and that, assuming that sale to be effectual for some purpose, the plaintiffs have a right to redeem.

I say, assuming that sale to be effectual for some purpose, because on that point I express no opinion: had my conclusion been different upon the main question, it would have been necessary to have considered the circumstances detailed in the answers

(a) 3 Leon, 110. (b) Tit. Executor, Pl. 174.

1850. respecting that transaction. The bill in this case was filed in March, 1843. The sheriff's sale took place in November, 1844. At that period, not only was the right of the sheriff to sell the equity of redemption under the writ of *fi. fa.* denied by the plaintiffs, but the defendants had, in this court, denied the existence of an equity of redemption. Under such circumstances of uncertainty as to the very subject matter of the sale—all parties acting in ignorance of its effect—that which was confessedly a valuable interest was sold at a merely nominal price. Such a transaction may be sustainable, but there are principles acted on in this court which would be required to be carefully weighed before arriving at that conclusion (a).

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Two other points require to be mentioned, but upon them I do not feel that I can usefully add anything to what I have already said, either upon the former hearing or in disposing of the motion for the injunction. I continue to be of opinion that we should not be justified in depriving the plaintiffs of this equity of redemption under the 11th clause of the Chancery Act; and my opinion upon that subject has not been changed by the judgment of the Privy Council in *Simpson v. Smyth*. And I continue to think that the pledgee of this estate is bound to account for all the profits derived from the pledge while it remained in his hands; and that he must, therefore, account for the proceeds of the timber felled, whether rightly or wrongly, during his occupation.

SPRAGGE, V. C.—In this case the tenant of the fee simple, *Stewart*, demised the premises in question to defendant, *Sheldon*, to secure a debt of 625*l.*, creating out of his estate a conditional term of 1000 years for that purpose. He remained then seized of the reversion expectant upon that term, or seized

(a) *Twining v. Morrice*, 2 B. C. C. 326.

of the reversion subject to that term. The term then was in *Sheldon*, all the residue of the estate was in *Stewart*. The mortgage money was payable in 1824, up to that time he had in him simply the reversion, and with it the legal right to put an end to the term by paying the mortgage money, and thus causing the entire estate to revest in him. This right he must have had as reversioner, or as a tenant of the fee, who had granted a conditional term but performed the condition, and so extinguished the term. He had not the right as mortgagor, but being owner of the land he was enabled to pledge it to secure a debt, and so to establish as between himself and the lender the relation of mortgagor and mortgagee. Being owner, and as owner of the land, he created the term as a pledge to secure the debt, and as owner he had a right to redeem his pledge. It could not be, as it appears to me, as mortgagor that he had a right to redeem. Indeed, the very act of redeeming would extinguish his character as mortgagor; and besides, another, who might become owner by purchase, descent, or otherwise, would have the like right to redeem as the original owner, though not himself the mortgagor. Such other, it is true, would stand as to the mortgagee in the place of the original mortgagor, but that which he had acquired from the owner who had created the mortgage was not the mortgage, but what the owner himself had—namely the reversion; and by virtue of having acquired that, he would have the right to redeem the mortgage. This right to redeem could not exist, I think, by reason of any right of the owner of the land in respect of the term which he had granted. The term was out of him—in the termor; his right was to extinguish the term, and so accelerate his reversion; a right such as this could not be inherent in the term. The right was in one person, the term in another; and they were antagonistic in their nature; the exercise of the one destroying the other. It is clear, (and is expressly held) that this right was

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1850. inherent in the land. If not in the term it must have been in the reversion, and in the reversioner as reversioner, unless in him as mortgagor, which latter I think cannot be.

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Thus far I have considered the position of the mortgagor *before* condition broken. It appears to me to be clear that the right to redeem was in him as reversioner; or, in other words, that the right to redeem was inherent in the reversion. *Upon* condition broken, there occurred a *legal* forfeiture of the term. Against that forfeiture equity relieves; the right to redeem continues; being converted from a legal into an equitable right, the party entitled to redeem being the same, and being entitled to redeem in the same character. What the legal right to redeem was in the eye of the law, the equitable right, the equity of redemption, is in the eye of a court of equity; equity holding the mortgagor (as in the civil law) the real owner of the land, until decree of foreclosure, and possessed of it in his ancient and original right.

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With the exception of a passage quoted in the judgment of the court on the former hearing, from *Coventry's* notes to *Powell* on mortgages, I have not found the equity of redemption expectant on a mortgage for years, treated as residing in the mortgagor as a *separate* right or title, from that of the right of the reversioner. It is clear that it belongs to whomsoever the reversion may belong, and devolves upon whatever person the reversion may devolve upon; whether common law heir, customary heir, heir in gavelkind tenure, or in borough-english; to such heir says *Crabbe*, "the right of redemption *of course* belongs." The reversion, whether acquired by descent, conveyance, or by devise, has with it the equity of redemption. Equity views the mortgage as a mere accessory to the debt secured by it—a mere pledge for its payment. The mortgagor is the owner of the

land upon which the mortgage is an incumbrance, 1851.
 and so *Crabbe*, in his essay on real property (a) says, ^{hisbohm}
 "an equity of redemption descends or is vested in such ^{Sheldon.}
 person as would have been entitled to the land if
 there had been no incumbrance." Again, when we
 consider what an equity of redemption *is*, it appears
 to me to negative the idea of its being a separate
 right or title from that of the right to the reversion.
Coote defines it as follows:—"An equity of redemp-
 tion then, is in equity, the ancient estate in the land
 without change of ownership;" it is not described as
 a separate estate, but as *the ancient* estate in the land
 without change of ownership. Before forfeiture at
 law, the right to redeem could not be a separate
 right from the right to the reversion; and there is
 nothing (that I have met with) to shew that it is any
 more a separate right after legal forfeiture than it was
 before; its incidents are the same, the change being
 only from a legal to an equitable right. It being not
 a mere equitable right, but an equitable estate, does ^{Judgment.}
 not, in my view, alter the case. It is an equitable
estate, inasmuch as equity holds the mortgagee to be
 only a trustee of the land for the mortgagor until
 foreclosure, and the mortgagor the real owner of the
 land; but it by no means follows from its being an
 equitable *estate*, that it is a right separate from the
 right to the reversion; on the contrary, *Lord Hale*
 says of it in *Pawlett v. Attorney General*, that it is
 inherent in the land; and it was held recently, in
Downe v. Morris, that it was an equitable right in-
 herent in the land; and if inherent in the land, then
 inherent (necessarily, as it appears to me) in the
 reversion, as the only estate in the land held by the
 person entitled to the equity of redemption.

There is another passage from *Coventry's* notes to
Powell, on mortgages, quoted in the former judgment
 in this case, to this effect: "The reversion, it is true,

(a) Sec. 2265.

1850. forms no part of the mortgage transaction, and in
 Chisholm ascertaining the estate and interest of the mortgagor
 v. Sholdon. it would not be correct to say that he has also a
 reversion, for he has not the reversion in virtue of his
 character as mortgagor, but as tenant of the fee
 simple." Upon this passage I will only remark that it
 contains nothing inconsistent with my position that
 the mortgagor has the equity of redemption, not in
 virtue of his character of mortgagor, but as reversioner
 —as tenant of the fee simple.

Judgment. The mortgagor in this case having granted out of
 him a conditional term, that term stood against him
 unless redeemed: he had the right to redeem; and the
 question is (or at least one question is) in what
 capacity—because entitled to the reversion, or because
 he mortgaged? Does any estate remain in him as
 mortgagor? If he is seized of the reversion subject
 to the term, which is the whole estate remaining, and
 so seized as reversioner, there is no estate to remain in
 him as mortgagor; and in mortgages in fee also, he
 redeems not as mortgagor, but as the real owner of the
 land, and as such entitled to discharge it from its in-
 cumbrance.

If a man grant a mortgage term for 1000 years,
 and afterwards grant another term for a shorter pe-
 riod—say for 500 years or for five—he does not carve
 this second term out of the first, though comprehended
 in it in point of time, but he does it in the exercise
 of his rights as a reversioner. This reversion is not
 a dry reversion postponed for 1000 years, but only
 subject to a *conditional term*, which he may redeem
 (the mortgage money being payable) at any time,
 and then the term ends—that is, merges in the rever-
 sion; and if he grant to another the whole, or any
 portion of the reversionary right, he thereby vests in
 his grantee the right to redeem the conditional term.
 He grants this clearly not as mortgagor, nor as having

any interest in the mortgage term, but simply as reversioner; and granting as reversioner that which carries with it the equity of redemption, is an additional proof to my mind that the equity of redemption is inherent in the reversion. This is clearly put by Sir *John Leach*, in the case of *Stephens v. Bridges* (a). He says, "When the mortgagor had granted the term of 1000 years, he remained seized of the reversion subject to that term. He had power to grant his rights as a reversion, to be enjoyed by his grantee, either absolutely and for ever or for any limited portion of time; and the term of 500 years which he afterwards created upon the second mortgage, legally invested the second mortgagee with the rights of the reversioner during the period of 500 years, and entitled him to the immediate possession of the mortgaged premises if the prior term of 1000 years should happen to determine at any time during the term of 500 years, by forfeiture or surrender."

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Aboldon.

Judgment.

To consider this case in other points of view: Suppose a mortgagor of such a term to grant to a third person his equity of redemption, what would be the effect of such a grant? If he retained the reversion and his grantee redeemed the term, would the grantee have taken any beneficial interest by his grant? The legal estate in the term would indeed continue to subsist, but in the mortgagee: what then would remain to the grantee of the equity of redemption? It may be that the satisfied term outstanding in the mortgagee would be held to be an attendant term for the benefit of the mortgagor's grantee who had redeemed it, as it would be a manifest wrong to him that it should attend the reversion; but it does not follow that it would be an absolute term for his benefit for 1000 years. If so, it would carry with it more than if the mortgagor had carved out of his

(a) *Mad. & Geld. 67.*

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reversion some positive estate; but if a redeemable interest, then how and when redeemable, and upon what terms, none being expressed? There would be difficulty in holding this. Such a grant then might carry with it nothing whatever, or possibly a redeemable interest, or in another view it may carry with it the whole estate of the mortgagor; and Mr. *Coventry* in a note to *Powell* on Mortgages, p. 260, appears to think it has this effect. He says, that "a sale of the equity of redemption is generally understood to comprehend a sale of the reversion also;" and it appears to me to be a sound view of the law that it should be so. If the mortgagor carve a specific estate out of his reversion, it is not a sale of the equity of redemption, but a positive creation of an estate. If he carve out no estate, but sell and convey *eo nomine* his equity of redemption, must not his grantee take either nothing at all or the reversion? and if the reversion, then because it must be intended that that estate in which alone the equity of redemption resided must be taken to be granted with it, in order to any effect being given to the grant. If this view be correct, the equity of redemption could not, upon a grant of it, subsist separately from the reversion. It is indisputable that the mortgagor may grant either his reversion, or out of it some estate entitling the grantee to redeem; but according to my view of the law, he cannot so grant the equity of redemption as to make it subsist of itself as a separate and independent estate. It may be said that, supposing it to be so, it should carry with it the mortgage term, or a term commensurate with it. I do not see this. It would not be so as a necessary legal intendment, nor is there anything in such a grant to indicate that the grantor meant it so.

Judgment.

Again: Suppose a mortgagor for years were to sell and convey his reversion with an express reservation to himself of the equity of redemption. It is difficult

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perhaps to say how such a conveyance would be construed. I think it by no means clear that he would be held entitled for his own benefit to the term which he had mortgaged, to hold it as an absolute term against the revisioner—the revision being expectant, not upon an absolute, but upon a conditional term. But even if he were held so entitled, it would not affect the principle that the equity of redemption is inherent in the reversion, because he would be held so entitled only upon the principle that he had created out of his reversion an absolute term commensurate in point of time with the mortgage term; and such absolute termor would have in him the right to redeem, as purchaser of a portion of the *reversionary* interest of the mortgagor expectant upon the conditional term.

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Or, again: Suppose the mortgage money and interest paid off by the receipt of rents and profits, the condition, upon the performance of which the term was to cease, is thus performed, at least in equity, and the term itself at an end, or only subsisting as a satisfied term to attend the inheritance,—Is not the person entitled to the reversion subject to that conditional term, necessarily the party entitled when that to which his reversion was subject is at an end?

Judgment

Or, suppose the plaintiffs voluntarily to have paid off the mortgage money,—the revisioner and the mortgagee, however, being different persons, could they claim the residue of the term as theirs absolutely; and upon what principle? They claim under Chisholm;—no term remained in him. To grant their claim would be to create a new estate, a term absolute, unconditional, for 1000 years. The mortgagees have no such estate. Could the revisioner be called upon to create such an estate? The utmost, as it appears to me, that the plaintiff could ask in such a case would be that they should be

1851. recouped by the revisioner what they had paid in removing the term out of his way, but I do not see how they could get even that.

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The plaintiffs claim under Chisholm's will. What passed by that will? No term of 1000 years—he had no such term. He had granted such a term conditionally. What remained in him? The reversion, and with it, as inherent in it, as I conceive, the equity of redemption. The reversion was in them up to the sheriff's sale; by that the reversion passed to the purchasers. If they now claim to be entitled to a term of 1000 years, subject to the mortgage, they claim that under the will of their testator which their testator never had. What he had was a reversion, subject to a conditional term. What they claim is an absolute term subject to a mortgage.

Judgment.

The case of *Plunket v. Pearson (a)* is authority for the position that the reversion of lands mortgaged for a term of years is legal assets; and Mr. *Crabbe* in his treatise on real property (*b*), says "If lands in fee be mortgaged for a term of years, the equity of redemption will in that case be assets at law, because the reversion *which attracts the redemption* being assets at law, the equity of redemption ought to be so too."

The case of a dowress, of tenant by elegit, by the courtesy, &c., appear to me to bear a strong analogy to the case of the purchaser of the reversion at sheriff's sale. The dowress being dowable of the reversion subject to a mortgage term, may redeem the mortgage and thus remove the term out of her way; this she does as a *quasi* revisioner.

A tenant by elegit is also entitled to redeem such

(a) 2 Atk. 294. (b) Sec 2264.

a mortgage. He must do so in virtue of the character he has acquired from having taken in execution some estate of the mortgagor. The estate taken by him in execution could not be the term; that was not in the mortgagor, nor the equity of redemption, that not being liable to execution. He must have seized the reversion, and being in, as *quasi* tenant of the reversion, he is clothed with a character which entitles him to redeem the mortgage term. It is true that he then holds the land not as his own but to recoup him what he had paid and to satisfy his own debt. This he does because the law gives that effect to the writ under which he becomes tenant in elegit. He acquires by that writ a qualified interest in the reversion, and that qualified interest carries with it the right to redeem. It does appear to me that where the law authorizes a process whereby the *absolute* interest in the reversion may be acquired, that absolute interest must equally carry with it the right to redeem. In each case the reversion is taken in execution: in each case a reversionary interest is acquired, which reversionary interest as a general rule attaches to it the equity of redemption. An equity of redemption *per se*, can no more be taken in execution under writ of elegit than under writ of *fi. facias*; but under both the *reversion* may, and so the equity of redemption be acquired with it. The only difference, as I conceive, is, that under the one the reversion is required qualifiedly—under the other absolutely. Its being acquired absolutely appears to me a reason, *a fortiori*, why that which is inherent in it should pass with it.

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Judgment.

It has been held by this court, as well as by the Court of Queen's Bench of this province, that a reversion may be sold under a writ of *fi. fa.*; and in the former hearing of this cause it was decided that the reversion of *Chisholm* in the mortgaged premises in question passed by the sheriff's sale. In that I

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concur. Every consideration bearing upon the question appears to me to lead to the one conclusion, that the equity of redemption is inherent in the reversion, and that it passed with the reversion at the sheriff's sale. Assuming that the devisees under *Chisholm's* will had the power to grant the equity of redemption, leaving the reversion intact, still no act was done by them, changing the reversion in any one point from the reversion which *Chisholm* had. *Chisholm* had the reversion, and, as I conceive, as inherent in it the equity of redemption. What *Chisholm* had was sold, unaffected—at least by any act of his devisees; they did not (even if they could) effect a severance of the equity of redemption from the reversion. The law is not, I think, to be taken to have severed these interests—the reversion from that which is inherent in it. It has not that effect in the case of an elegit, but the contrary; and in regard to a severance being effected by *Chisholm's* creditors for the purpose of satisfying their debts from his estate, it was plainly against their interest to effect such severance; and they are not, I think, to be taken to have done that which was not necessary for them to do (for the reversion was clearly saleable at any rate), and which if they did, would strip that which was clearly saleable of everything valuable about it.

It was questioned in argument by Mr. Mowat for the plaintiffs, whether the reversion was properly saleable at law; and he contended that its being legal assets did not make it therefore saleable at law; and he cited *Wilson v. Fielding* (a), case of Crs. of Cox (b), *Hartwill v. Chitters* (c), *Clay v. Willis* (d), and *Baker v. Grey* (e). In none of these cases, however did the assets in question consist of a legal estate, unless the case put in the judgment in *Wilson v. Fielding* of a lease for years be such estate. It is

(a) 2 Vern. 763. (b) 3 P. W. 342; (c) Amb. 308. (d) 1 B. & C. 364. (e) 9 B. & C. 459.

put thus: "But if there had been personal assets, as a lease for years, a bond, or the grant of an annuity in a trustee's name, &c." I take the words "in a trustee's name" to apply to all, including the lease for years, but even if not, the putting of a hypothetical case in such ambiguous terms, and not very satisfactorily reported, would be a slender ground on which to hold that a reversion was not saleable. I may remark too in regard to the cases of the *Crs. of Cox and Hartwell v. Chitters*, that they are considered as of questionable authority. In the argument of the case of *Sharp v. The Earl of Scarborough (a)*, Sir John Mitford said of them that they have been considered as over-ruled. The cases of *Clay v. Willis* and *Barker v. May*, were clearly cases of equitable assets.

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The land claimed by these plaintiffs was assets for the satisfaction of the debts of *Chisholm*. If there had been no mortgage, it would of course have been legal assets; if the mortgage had been in fee, then only equitable assets. It has been treated as assets at law by sale of the reversion. Suppose the right to redeem to be in the plaintiffs, these lands would still be assets, and liable for the satisfaction of the debt for which they were sold,—the question then is little more than whether they are legal or equitable assets. They may certainly have been sold at a great sacrifice: that frequently happens where lands are sold by legal process, or under the direction of a Court of Chancery; and the sacrifice in this case was probably greater, if, as is stated, the heir-at-law of *Chisholm* was present at the sale and forbade it, stating that the right to redeem was in the heirs or devisees of *Chisholm*, and could not be sold. If in truth it passed with the sale of the reversion, he cannot reasonably complain if the sale was damped, and the value of the property depreciated by his denial of it.

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(a) 4 Ves. 541.

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It is said that such a sale is against public policy. I grant that a sale of land subject to a mortgage must generally be unsatisfactory, and that it would be better that the amount due should be first ascertained and settled by competent authority, as a purchaser would then know exactly what he was giving for the land, and unless this be the case, land will almost certainly sell to a disadvantage. It is certain, too, that where the title is in dispute, so that a purchaser buys with some doubt whether there is not some defect in it, the sale will be injuriously affected. Still, these are not reasons in law to avoid the sale on grounds of public policy. The case of *Doe Ausman v. Minthorne* (a) cited upon this point, certainly does not go that length.

Judgment.

In considering the sale which has taken place, in relation to the objection to it on the score of public policy, it should be borne in mind that the legislature has, by express enactment, authorized sales of the equity of redemption, comprehending such sale as has taken place here as well as in cases where the estate is purely equitable. Now, however impolitic such a provision may appear to the mind of a court, a sale sanctioned by it, cannot, I conceive, be held objectionable on the ground of public policy. When parliament has expressed its opinion by legislative enactment that such sale is expedient and politic, a court is, I think, precluded from holding it to be otherwise.

The circumstance of the reversion in this case being purchased by the mortgagee of the term, appears to me to be a serious difficulty in the way of the plaintiffs. The term has at law merged in the reversion, so that there is no term now subsisting. Whether a court of equity would keep the term on foot and hold the reversioner a trustee of the term for the

(a) 3 U. C. Q. B. 403.

benefit of *Chisholm's* devisees, may admit of considerable doubt. If they are entitled to redeem, and upon redemption to hold the lands for an absolute term, the reversioner might be declared a trustee for their benefit. It is not however now, a satisfied term subsisting in law, and which a court of equity might decree to be attendant for the benefit of those beneficially entitled, but a term absolutely *merged*, and it would, as it appears to me, be necessary for the court to direct the positive creation of an absolute term by the reversioner out of his reversion.

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I should have been of opinion, for the reasons which I have given, that the equity of redemption in this case passed with the reversion as inherent therein, even without the case of *Viscount Downe v. Morris*.

In that case the lands were situate in a manner of which the plaintiff was lord; a former owner of the land had mortgaged the same for a term of 1000 years, and died leaving the same to a natural son of one *Sarah Arrowsmith*, in fee. The devisee died intestate and without heirs, and thereupon, the lord of the manor claimed the land by escheat, and filed his bill against the mortgagee to redeem, and the mortgagee defended the suit. This is the substance of the case. It was held by *Sir James Wigram*, that the reversion passed to the lord by escheat, and with it, as inherent in the land, the equity of redemption. Several difficulties existed in the way of the plaintiff in that case (as will appear upon a perusal of it,) which do not apply to the party who has acquired the reversion here. I should say that this case is much stronger for the reversioner.

Judgment.

It had been decided in *Burgess v. Wheate*, that when the estate was purely equitable, there was no escheat. *Sir James Wigram*, says: "In *Burgess v. Wheate* there was no escheat at law. The object of

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that suit was to have it declared that where *cestui que trust* died without heirs the land escheated in equity, and the court denied it. In this case there is an escheat at law, the lands have escheated to the lord subject to a mortgage term of years, created by a late tenant of the fee, and the fee simple at law is now vested in the lord." That which vested the fee simple in the lord and with it the equity of redemption was precisely the estate which passed in this case by sheriff's sale, viz: a reversion, subject to a mortgage term of 1000 years. If there had been no reversion, and consequently no legal estate, nothing would have passed to the lord by escheat. just as, under the like circumstances, nothing would have passed by a sheriff's sale. *Sir James Wigram* assumes it as indisputable that an equity of redemption on a mortgage in fee would not escheat. He says further, "The lord takes in reversion; he resumes the possession of the land upon the determination of the grant to the tenant. His estate is the old fee, of which he becomes seized in possession, upon the extinction of the tenancy;" and he asks: "Is it true that when the lord by force of his legal right, thus resumes the land upon the determination of the estate of the tenant of the freehold, no equity whatever which remained in the tenant can pass to the lord?" Again, "when the lord takes the inheritance as escheated, he takes the term as attendant upon and following the fate of the inheritance, according to *Sand's* case, *Pawlett's* case, and *Lord Jeffries'* determination.

In another part of his judgment he says: "As a general proposition, whatever estate or benefit the tenant retains which would have passed to his heir, if he had any, and which could be the subject of grant, that the lord by escheat may claim. Now, an equity of redemption is in all respects an interest of the nature of those which at law would pass to

the lord by escheat. It is an estate or interest in the land reserves or retained by the tenant, vested in him at the time of his death without heir, which would descend to his heir if he had one, and which may be the subject of grant." "The equity of redemption is an estate in the land, not aliened. The equitable interest in an attendant term will pass to the lord with the legal freehold. Why should not an escheat of the freehold carry with it the mortgagor's estate in the land, and the right to make the term attendant by paying the mortgage money? Why is the legal estate which in this case the lord takes without the aid of this court, not to draw to it this particular equitable interest?" These questions of *Sir James Wigram* seem to me to be, in their spirit, equally applicable to this case. It may, I think, with equal force and propriety be asked, why is the legal estate which in this case the person who has acquired the reversion takes without the aid of this court, not to draw to it this particular equitable interest? In concluding his judgment, *Sir James Wigram* observes—"Upon the whole, deferring entirely to the authority of *Burgess v. Wheate*, I think this case is unaffected by it, and that this is a case in which I am bound to hold, that an equitable right of this nature *inherent in the land*, and retained by the tenant at the time of his death without heirs, which would have descended upon his heirs, and which might be the subject of grant, passed with the land to the lord claiming by escheat, and may be enforced in this court by subpoena."

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Judgment

There are other passages in the able judgment of *Sir James Wigram* which bear upon the question involved in this case. I selected those which I have read as peculiarly applicable—as shewing the principle upon which he held the equity of redemption to pass to the lord to be the same principle as must, in my opinion, govern this case. In *Downe v.*

1851. *Morris*, the lord acquired by escheat the reversionary interest of the mortgagor, being a reversion subject to a mortgage term of 1000 years. In this case, the defendant acquired by purchase the reversionary interest of the mortgagor, being a reversion subject to a mortgage term of 1000 years. The estate acquired was in both cases the same. In my mind, the case of *Downe v. Morris* is a direct authority for the equity of redemption passing with the reversion. I should have felt bound by it even if I had not been led to the same conclusion by the reasons which I have given.

Judgment.

I have entered more at large into this subject than I otherwise should have done, from being aware, from the former judgment given in this cause, that I have the misfortune to differ from the learned judges who concurred in that judgment—his lordship the Chancellor and Mr. *Jameson* the late Vice-Chancellor—his lordship the Chancellor retaining the opinion expressed in that judgment; but with the greatest respect for that opinion, I have been unable to come to any other conclusion than that which I have expressed. I am of opinion that the plaintiffs are not entitled to redeem.

Some points were raised by the defendants at the hearing, which, with the view I take of the case, it is unnecessary to determine. Upon these points therefore I express no opinion.

SPRAGGE, V. C., proceeded to observe, that as two only of the members of the court were in a position to give judgment in this cause (*Eston*, V. C., having been concerned in the cause while at the bar), and as these two differed in opinion, it became necessary, in order to some judgment being given, that one should concur *pro forma* in the judgment of the other, as without that neither party would be in a

position ever to carry the cause to the Court of 1850.
Appeal; that an appeal appeared probable, and he
thought it should properly fall upon that party who
had his opinion only in his favor, the other party
having had the opinion of two members of the
court; and his lordship the Chancellor retaining
upon the rehearing of the cause the opinion he had
expressed on the former hearing. The learned Vice
Chancellor therefore concurred *pro forma* with the
Chancellor.

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Judgment.

CREELMAN V. CLEFFORD.

Practice—77th order—infant defendants.

Held per Cur.—Spragge, V. C. *dissentiente*—that in suits against infant defendants, the court would make a decree for summary reference to the master under the 77th order of May, 1850: the decree, however, directing that in the proceedings before the Master the plaintiff should be obliged in the first instance to prove the execution of the conveyances.

This was a suit for the foreclosure of mortgage; and Mr. *Morphy*, for the plaintiff, moved for the usual decree of reference under the 77th order of May, 1850, —some of the defendants being infants.

Statement.

Mr. *Turner*—*amicus curiæ*—said it had been decided in England that infants were not within the operation of the order authorizing the plaintiff to file a traversing note; and therefore it might be doubted if liable to be proceeded against under this order. The cause stood over for consideration.

Argument.

THE CHANCELLOR.—This motion stood over for the purpose of considering a doubt suggested at the hearing, whether the 77th order of May, 1850, be applicable in the case of infant defendants. Upon consideration, I think that doubt unfounded. In framing that order, we proceeded upon the opinion that in the cases, and for the purposes embraced in that order, we might safely and advantageously proceed upon affidavit evidence; meaning by that term

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1851. to comprehend the affidavits of the parties—such evidence, in short, as is acted upon in ordinary motions. Where the preliminary questions are free from doubt—and they are so in a great majority of cases—this mode of procedure is obviously unexceptionable. To such cases, the form given in schedule C, appended to the orders of January, 1851, was intended to apply. But the order is not confined in its application to such cases. Instances may arise where greater detail in the number and form of the affidavits may be proper; and then, notwithstanding some conflict, the balance may be so clearly in favor of the plaintiff as to make it the duty of the court to order the reference. Each case of that kind must be determined by the court upon its own circumstances, with a view, however, to this consideration, that it was not the intention to withdraw from the ordinary course of proceeding cases in which the preliminary question should be found involved in doubt.

judgment.

Subsequent experience does not shake my confidence either in the justice or expediency of this mode of procedure; and I think it as applicable to infant cases as others; especially having reference to the 4th of the orders of January, 1851, under which the interest of the infant may be as carefully guarded in this as the ordinary mode of proceeding.

With that view, I think that in foreclosure suits, where there are infant defendants, the decree should direct the Master to require proof in the first instance, as to the execution of the mortgage deed, and, that having been established, the reference will proceed in the ordinary way.

ESTEN, V. C., concurred in the opinion expressed by his lord-ship the Chancellor.

SPRAGGE, V. C.—The order under which this application is made, provides, that in suits for an account,

or where an account is necessary, when the court can proceed to the ultimate decision of the case, and *where the state of such account only, and not the accountability of the defendant*, is the matter in question; and in suits for the redemption or foreclosure of mortgages, where the state of the account, or the account and the priority of the incumbrances, *form the only subject of inquiry*, the plaintiff may apply to the court for a summary reference. It has been the practice under the direction of the court to produce on the hearing of the application an affidavit of the plaintiff, verifying the plaintiff's bill.

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In this case the defendant is an infant—the suit for the foreclosure of a mortgage; and the question is, whether the plaintiff is entitled upon the usual affidavit, without more, to an order for a summary reference. Has he established that the state of the account, or that and the priority of the incumbrances, *form the only subject of inquiry*? In the case of an adult, I should have doubted (if I had not found the practice otherwise), whether the plaintiff would not have been bound to prove such mortgage and assignment as would have left as the only subject of inquiry the state of the account, or that and the priority of the incumbrances. I take it that such proof must be held to be unnecessary, on the ground that a defendant shewing no cause against the reference prayed, must be taken as admitting those matters which are necessarily preliminary to such an inquiry; the court requiring also as a protection to the defendant, in addition to the notice served upon him, the plaintiff's affidavit in verification of his bill. In the case of an infant, however, the circumstance of no cause being shewn against the reference prayed cannot be taken as against him, as an admission of anything. The plaintiff's affidavit is not, in my opinion, evidence against the defendant in proof of the facts which must be established in order to the

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1851. state of the account (or that and priority of incumbrances) being the *only subject* for inquiry. Granting that the court might make an order that the plaintiff's affidavit in such a case should suffice for proof of the execution of the mortgage, and of any other documents, or of facts preliminary to the inquiry asked for, still, no such order *is* made, nor any order giving *any* effect to the plaintiff's affidavit of verification or to the circumstance of cause not being shewn against the application. The rule is, that against an infant the case must be proved by strict evidence, and this even though the facts are not disputed by those acting for him; even though admitted in the answer put in on his behalf. He is not taken as *admitting* anything. If a formal admission of a fact in an answer put in for him does not dispense with proof of that fact, it is impossible, as it appears to me, to take it as admitted upon his mere silence or failure to appear. Many instances might be adduced of the extreme care taken by the courts that all facts affecting the rights of infants shall be strictly proved against them. For instance, a deed proved for an infant when a plaintiff, was ordered to be proved anew against him when, upon an amendment of the bill, he became a defendant (a). So in suits for foreclosure where any of the defendants are infants, an application cannot be made for a summary reference under 7 Geo. II. c. 20, because, although all the adult defendants may make the necessary admission, no such admission can be made by or on behalf of the infants (b). Again, in a suit by infant plaintiffs and no replication, the effect is different from what it would be in the case of an adult plaintiff; the defendant being bound to prove his answer as if the answer had been traversed: so held by Lord Hardwicke in *Legard v. Sheffield* (c);

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(a) Plunkett v. Gorrie, 2 Sch. & L. 159. (b) Lushington v. Price, 9 Sim. 651; Green v. Mitchell, 10 Sim. 484. (c) 2 Atk. 377.

and as in that case a failure to reply was not taken as an admission of any fact alleged by the defendant—though in the case of an adult plaintiff it would have been—so here a failure to shew cause cannot be taken as an admission of any fact alleged by the plaintiff; though in the case of an adult defendant that effect appears to have been given to it. I say this, conceiving that the plaintiff's affidavit of verification is protective only, and not evidence; and that the reason of evidence being dispensed with must be because the failure to appear must be taken as an admission.

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Clefford.

Another instance of the great caution of the court in case of infants, is, that they will take no admission on their behalf on which to found a case for the opinion of a court of law (a).

Since writing the above I have met with the case Judgment. of *Smith v. Constant*, reported at p. 97 of the "Jurist" of the present year. The plaintiff claimed as equitable mortgagee, and proceeded by claim; and the plaintiff's affidavit was offered in proof of the handwriting of the defendant to a memorandum of deposit; when *V. C. Knight Bruce* said, "I cannot permit the plaintiff to be a witness on her own behalf in a suit by claim, any more than I could had she filed her bill." After hearing the argument of counsel, the learned Vice Chancellor observed, "What is wanted here, is proof of the handwriting of defendant to a particular document, to which the plaintiff has sworn, but I cannot receive her affidavit as evidence." The matter stood over, and the plaintiff's case was proved by evidence other than her own affidavit. Evidence was given on behalf of the defendant, and the usual decree made for the plaintiff.

(a) *Hawkins v. Luscombe*, 2 Swanst. 375.

1851. Looking at the terms of the order under which this application is made, and the circumstance of the defendant in this case being an infant, I cannot help thinking, with deference to the opinion of his lordship and my brother *Esten*, that the plaintiff is not entitled to any decretal order until he proves his case against this infant defendant by regular evidence.

Creelman
v.
Clefford.

WATERS v. SHADE.

Practice—Opening publications.

Judgment.

Where on the examination of a witness on the 24th of January, a person's name was mentioned as having been resident on a lot adjoining the premises in question in the cause, and on the 28th of March, after publication had passed, the cause set down for hearing, and a subpoena to hear judgment served, the defendant moved for leave to open publication and examine as a witness the person whose name had been mentioned, and who he had sworn could give material evidence—the motion was refused, with costs.

The bill in this case was filed to set aside the registration of the deed of the defendant. The transactions giving rise to the suit occurred about the year 1822-3. Witnesses had been examined, publication passed, and the cause in the paper for hearing. On the examination of one of the witnesses in the cause on the 24th of January, it was stated that one *Philip Salzberry* had, at the time of the plaintiff's obtaining his deed, resided next to the premises in question in this cause: Thereupon the defendant *Shade* made affidavit that, since the examination of the witnesses in this cause, and after the 13th day of February deponent had discovered and believed that *Philip Salzberry*, an intelligent and sober man and of excellent character, could give material evidence in the cause, and was a material and necessary witness for deponent therein; that one point in question between the parties was as to whether a deed or alleged deed, under which plaintiff claimed, was executed by the grantor at or long after the date thereof; and that *Salzberry* was able to give clear and definite evidence on the point, and fixes the

time by reference to the date of his own marriage and a book; that upon deponent hearing that *Salzberry's* name had been mentioned by the witnesses as a person who had resided next to the lot of land mentioned in the pleadings, he had gone to and obtained from *Salzberry* the information set forth in his affidavit, and that such information was given without any inducement or reward, or promise thereof.

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Shale.

Statement.

Upon this affidavit, a motion was made on behalf of *Shade* to open publication and permit him to examine *Salzberry* as a witness—*Shade* undertaking to do so forthwith and not delay the hearing of the cause; and

Mr. *Mowat*, for the defendant, cited *Vinter v. Bickley* (a), *Lowe v. Firkins* (b) *Moody v. Leeming* (c), in support of the application.

Mr. *McDonald*, contr^a, cited *Patterson v. Scott* (d), and *Daniel's* Chancery Practice, p. 1136, Perkin's ed and the note on that page, as shewing the practice pursued in the courts in the United States in such cases, and whose system of taking evidence corresponded with our own.

ESTEN, V. C.*—This was an application to open publication and examine a witness, not delaying the hearing of the cause, which had been set down to be heard, and a subpoena to hear judgment issued and served. The affidavit filed on the occasion stated the materiality of the evidence; and the ground laid for the application to us is, that the person proposed to be examined had been named by some of the witnesses in the course of the examination as a person

(a) Price 460. (b) McClel. 73. (c) 1 Mad. 85. (d) Ante vol. I, page 582.

* The Chancellor was concerned in the cause while at the bar.

1851.

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v.
Shado.

Judgment.

who resided on the lot adjoining the land in question in the cause, and that the defendant had thereupon immediately applied to him, and learned the particulars which it was now desired to prove through the medium of his testimony. The application was opposed; and I am of opinion, after consideration, that although it is true that it is not necessary here as in England, in support of applications of this nature, to shew that the evidence already received had not been seen—as this rule would exclude such applications altogether—yet this very fact ought to make the court more guarded and cautious in granting them; and that it is a sound rule to lay down, that they never should be granted unless it appear that notwithstanding due and reasonable diligence has been used the evidence proposed to be taken could not have been obtained in the ordinary course. In the present case, it appeared that the circumstances of this witness having resided on the adjoining lot was esteemed by the defendant a sufficient reason for applying to him immediately. The same motive should have led to previous enquiry as to who were the persons residing in the neighbourhood, and if such enquiry had been made it would have led to the discovery of this evidence in time for it to have been obtained in the course of the general examination. This application must therefore be refused, with costs.

SPRAGGE, V. C.—The defendant *Shade* applies for leave to examine a person named *Salzberry* as a witness. Publication has passed, and the cause is in the paper for hearing. The point to which the defendant desires to examine this person is one upon which evidence has been given on both sides, viz., the actual time of the execution of the deed under which the plaintiff claims. *Salzberry* was not present at the execution of the deed; but it is alleged that he can fix the time by reference to his own marriage

and a book. Witnesses already examined have attempted to fix the time by circumstances within their own knowledge occurring about the same time, and have differed very materially. *Salzberry's* name was mentioned in the evidence of one of the witnesses examined on the 24th of January last, but only as residing on a lot adjoining the one in question; and this appears to have set the defendant upon enquiry. He appears to have leased a lot to one of the former witnesses. The evidence already given in relation to the point upon which the defendant desires to examine *Salzberry* has been that of persons living in the neighborhood at the time. One would suppose that *Salzberry*, living on the adjoining lot and probably cognizant of the dealings and transactions of his neighbours of such a nature as those deposed to, would have been inquired of by the parties before as to his knowledge in the matter. The circumstance which has suggested the enquiry now might reasonably have been expected to suggest it to the defendant when getting up his evidence before his other witnesses were examined. Again, the time which has elapsed since the mention of *Salzberry's* name in evidence, 24th January, to the time of the application, 28th March, has not been sufficiently accounted for as so diligently employed in examining as to the evidence, and applying for leave to give it, as upon an application of this nature it was incumbent upon the defendant to shew. He might, for all that appears, have given the evidence of this person when he gave the evidence of other neighbours; and since his name suggested inquiry, there has not been that active diligence in making the application which there should have been. The object of the application is to strengthen the defendant's case upon a point on which both sides have given evidence, and which evidence is known to the party applying. The fact of its being so known would, in England, be a bar to the application. To make it so here,

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where the evidence is always known, would close the door against all such applications; but it is manifest that the English rule affords a valuable safeguard against the patching up of the weak points of a case, by evidence collected after the testimony for the opposite party is closed.

Judgment.

Being without that safeguard here, it behoves the court to be certainly not less stringent than the English practice warrants, in allowing evidence to be given under such circumstances. It is, I think, at least doubtful whether such an application would be granted in England under the circumstances in which it is applied for here; while it is, I think, clear that, if in England evidence were taken openly as it is here, the court would grant such applications in very rare instances indeed. The language of *Lord Eldon*, in *Whitelocke v. Baker* (a), is very forcible upon this point. He says "that no more dangerous proceeding can take place than permitting parties to make out evidence by piece-meal, and to make up the deficiency of original depositions by other evidence," and in another place, speaking of the danger of admitting further evidence, after the party's having an opportunity of seeing that it would not be convenient to hear the cause upon the evidence on which he originally intended to hear it, he says "the danger from that would be enormous."

This danger appears to be fully appreciated in the United States. Mr. *Perkins*, in his note to *Daniel's Practice* (b), says, "The court, by extreme rigor, endeavours to guard against the abuse of introducing testimony to meet that which has been produced; and accordingly it has been held, that if, after publication has passed, the substance of the testimony taken on a material point, upon which further testimony is sought, has been disclosed to the party

(a) 13 Ves. 512. (b) p. 1136.

applying, it is too late to move to open or enlarge the rule on affidavit." 1851.

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I think it very important that no loose practice upon this point should obtain here ; and that it would be of dangerous tendency to lay down a precedent which would open a door to so serious an abuse as that which is so carefully guarded against both in England and America. I think this application should be refused, and with costs. Judgment.

MAIR V. KERR.

Practice—Foreclosure—Infant defendants—Re-hearing.

Where a decree of foreclosure against an infant defendant did not reserve a day after his attaining twenty-one to shew cause, and upon his attaining his majority the infant applied upon affidavits to put in a new answer and raise a fresh defence : *Held per Cur.* (Blake C., *absente*), that the relief asked could not be obtained without a re-hearing of the cause, and the motion was therefore refused with costs. Jan. 7 & 14 Feb. 7, March 25, April 8 & 29, and May 20, 1850.

Upon the re-hearing of a cause where the decree of foreclosure did not reserve a day to the infant: *Held per Cur.* (Blake C., *dissentiente*), that in decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one must be reserved to the defendants.

Where under such decree, an application is made to put in a new answer for the purpose of raising a defence different from that set up by the guardian of the infant, the application must be founded on affidavits shewing that the new defence is a proper one to be permitted to be raised ;—where, therefore, the ground of the application was, that the mortgagor was a mere trustee for others, and the affidavit in support of the motion did not state that the plaintiff had notice of such alleged trust,—the motion was refused, with costs. (*Esten, V. C., diss.*)

This was a foreclosure suit against an infant defendant. The bill was filed on the 2nd of June, 1846, the mortgage having been made on the 20th of December, 1836. Neither the decree nor the final order of foreclosure gave the infant a day to shew cause after attaining the age of twenty-one. Statement.

The defendant came of age on the 27th day of December, 1850, and now moved that he might be at liberty to put in a new answer, for the purpose of raising the defence of usury ; and that the mortgagor (the father of the defendant), was merely a trustee

1851. *Mair v. Kerr.* for two persons, named *Margaret Fowles* and *Catharine John*. The defendant, in his affidavit filed upon this motion, swore that he had made enquiry into the facts and circumstances connected with the mortgage transaction, and was satisfied therefrom that the mortgage was an usurious transaction between the plaintiff and the defendant's father; and believed that satisfactory proof thereof could be adduced; and the defendant further swore, that he had *been informed and believed* "that the said *William Johnston Kerr* was in fact at the time of the execution of the said mortgage, and up to the time of the absolute foreclosure thereof, a trustee only of the premises comprised therein for *Margaret Fowles* and *Catharine John*, who, as this deponent hath been informed and believes, were then the true and beneficial owners of the said premises, and that the said *Catharine John* still is entitled thereto; and this deponent has been informed and believes, that the said *Margaret Fowles* and *Catharine John* were in possession of the said premises or the greater part thereof; or the rents and profits of the same premises at the time of the date and execution of the said mortgage."

Argument. Mr. *Turner*, for the defendant, cited *Price v. Carver (a)*, to shew that a decree of foreclosure against an infant not reserving a day to shew cause after attaining twenty-one, was erroneous. It is laid down in books of practice that an infant attaining full age can shew error in the decree. Here we shew error in the decree, as it does not contain the clause giving him a day after attaining twenty-one to make a defence to the suit. Neither does the decree direct a reference to the master to enquire whether a sale or mortgage would be most for the benefit of the infant.

[ESTEN, V. C.—Suppose that this is error in the

(a) 3 M. & C. 157.

decree—if your client were adult, I suppose he could not take advantage of it in this way; and I know of no rule that will permit an infant, any more than an adult defendant, to adopt such a proceeding as this.]

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Usury is one of the defences intended to be set up. This, it is submitted, is paramount to the mortgage. Now all the cases lay it down that a defendant is at liberty always to show title paramount to the mortgage transaction itself. He also referred to and commented on *Savage v. Carroll* (a), *Kelsall v. Kelsall* (b), *Bennet v. Lee* (c), *Malone v. Malone* (d), *Williamson v. Gordon* (e), *Danl. Chan. Prac.* 242, *Anonymous* (f), *Spencer v. Boyes* (g), *Powell v. Robins* (h).

Mr. Mowat, for the plaintiff, contended that the defendant was not entitled to the day to show cause; but even if he be so entitled, a technical difficulty exists here to his obtaining the leave asked for. No case has been cited in which this error, if it be one, was held to be such as to entitle the defendant to come in this way. The case of *Perry v. Phelips* (i) shews the course that should have been adopted by the defendant; he must either apply for a rehearing of the cause, or file a bill of review, according to circumstances.

Argument.

In *Bennett v. Lee*, it is evident, on reading the case, that there must have been a day given to the defendant to shew cause in the decree. The defendant is bound by the decree so long as it stands, and if it be wrong, it certainly will not be altered in this way. The practice of giving to infant defendants a day to shew cause, after coming of age, grew up in analogy to the practice at law of the parol demurring; that practice having been abolished by statute,

(a) 1 B. & Be. 551. (b) 2 M. & K. 409. (c) Atk. 487, 529, (d) 8 Ck. & F. 179. (e) 19 Ves. 114. (f) Mosely 66. (g) 4 Ves. 370. (h) 7 Ves. 211, note 74. (i) 17 Ves. 178).

1851. equity would be justified in discontinuing the practice of giving a day to shew cause. All the court will do, even if the matter were properly brought forward would be to insert the clause. The cases shew that no new defence will be permitted; here, however, the defendants seeks to set up a totally different case.

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Argument.

This motion, if granted, would be so only on payment of costs; therefore, if refused, it will be refused with costs.—*Snow v. Hole* (a).

He also cited *Bennett v. Hamill* (b), *Macpherson* on Infants 430, *Hutton v. Mayne* (c), *Moore v. Moore* (d).

Feb. 7. ESTEN, V. C.*—This was an application by a defendant against whom an absolute decree of foreclosure was made during his infancy, on his attaining twenty-one, to put in a new answer and make a fresh defence to the suit. The defences proposed to be set up are, that the defendant was merely a trustee for other persons, and that the mortgage was tainted with usury.

Judgment.

As to the first point, the motion is unnecessary, and might be refused on that ground. The *cestuis que trustent* are not bound by the decree, and can file their bill either for an absolute conveyance of the legal estate, or to redeem, according as the mortgagee had or had not notice of the trust when he advanced his money and took the security—the mortgagee being as to the decree of foreclosure a mere volunteer. They could obtain no greater benefit than this if they were made parties to the present suit.

But, as to the other point, the case is different. The *cestuis que trustent* would stand in a very different

(a) 15 Sim. 16. (b) 2 S. & Lef. 574. (c) 3 Jones & La. 586.
(d) 2 Ves. Sen. 598.

* The Chancellor was absent when the case was argued.

situation as plaintiffs in another suit, from that in which they would stand as defendants in the present one. If they were to file a bill for the purpose of getting rid of the mortgage altogether, on the ground of usury (which might be necessary, as the mortgagee might have had no notice of the trust, in which case they would be obliged to redeem), they would be under the necessity of tendering the principal and legal interest; whereas, if it should be permitted to the present defendant to set up the defence in this suit, he might defeat the mortgage without subjecting his *cestuis que trustent* to any such obligation. It was contended, indeed, by the learned counsel for the plaintiff, that the defendant being a mere trustee had no interest in the matter, and ought not to be allowed the privilege which he claims. But I am of a different opinion; I think it is the duty of a trustee to protect the interests of his *cestuis que trustent* upon every occasion to the utmost of his power, and to claim the same privileges for them that he would for himself. If he were beneficially interested in this case, he would be let into this defence without question; and whatever he could do for himself he ought to be allowed to do for his *cestuis que trustent*. It is necessary that he should do so, because they would stand in a worse situation if he did not than if he did. We are obliged, therefore, on the present occasion, to consider this point of practice, which was described on a late occasion by an eminent judge as one involved in great obscurity. Various objections were raised to the application by the learned counsel for the plaintiff. He contended—first, that such a motion as the present could not be made in the face of an absolute decree; second, that an absolute decree of foreclosure against an infant is now correct; third, that if not, it could not be rectified upon such an application as the present, but only upon a re-hearing or bill of review; and fourth, that if so rectified, it would not

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1851. enable the defendant to make a fresh defence to the
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 Kerr. suit, but only to shew error in the decree according
 to the present state of the record.

With respect to the first point, it became necessary to consider whether the right to make a fresh defence after attaining full age existed irrespectively of the day to shew cause; and if not (and the decree ought to have given the day), whether it was not competent to the court to entertain the present application without putting the party to the circuitry of amending the decree in the first instance.

Judgment

It is remarkable that in the case of *Kelsall v. Kelsall*, cited in the argument, where it was considered that the day to shew cause was proper, it is not expressly mentioned that it was given, but the motion to put in a new answer and make a fresh defence was entertained and granted. It may be contended, however that it is to be inferred from the language of the report, although not expressly mentioned, that the day was given in that case. On the other hand not a single case—if *Kersall v. Kersall* be excepted—can be produced, in which this principle was extended to an infant to whom a day had not been given by the decree to shew cause against it. In this state of the authorities, it appeared to be our duty to decide that this privilege does not exist independently of the day to shew cause, and that, supposing that the decree in the present instance ought to contain this provision, it must be rectified in the ordinary manner before the application now under our consideration can be entertained. Here, in strictness, I might stop; but I think it right to state the views which I have been led to entertain upon the other points suggested in the argument, in order that the parties may weigh them carefully, and act as they may think proper.

In regard, therefore, to the second point urged by

the plaintiff's counsel, I am of opinion that the abolition of the parol-demurrer does not necessarily or properly infer the discontinuance of the day to shew cause, in cases where it was previously allowed, and that an absolute decree of foreclosure against an infant is as erroneous now as ever it was.

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The third point raised by the plaintiff's counsel is already disposed of, but the fourth requires some observation. It was contended that even if the decree in the present case had given the defendant a day to shew cause against it, when he came of age, it would not have entitled him to put in a new answer and make a fresh defence, but only to shew error in the decree according to the present state of the record; and, as confessedly no such error was shewn, that it would be useless to rehear the cause for the purpose of amending the decree. A good deal of apparent authority was cited for this position. In a variety of cases it has been said that the infant cannot unravel the account or redeem, but can only shew error in the decree; and in *Kelsall v. Kelsall*, which was a creditor's suit, and in which an application was made by a defendant to put in a new answer and make a fresh defence on attaining twenty-one, the Lord Chancellor, Lord *Brougham*, treated the case of a mortgage as an exception to the general rule, apparently meaning that in case of a decree of foreclosure against an infant, with a day to shew cause, he cannot put in a fresh answer. In the first place, it may be observed, that no intelligible reason can be assigned why a foreclosure suit should be exempted from the general rule. It may be quite as necessary for an infant to exercise the privilege in question in this case, as in any other. Of this, the case in *Mosely*, cited in the argument, is a strong example. In the next place, it appears to me that the language of the cases, which has been referred to, and upon which Lord *Brougham* apparently founded his dic-

Judgment.

1851. *Mair v. Kerr.* tum in *Kelsall v. Kelsall*, was not intended to negative the right of an infant in a foreclosure case to make a new defence when he attained his full age. The notion formerly prevailed, that a decree of foreclosure could not be made against an infant at all, but that it must await his becoming of age before it could be pronounced. This was the case in *Spencer v. Boyes*. It is to this idea, I think, that the language of the judges in the different cases which have been referred to was directed. They were not considering the case of a new answer and a fresh defence. Such a case was not before them. They were simply considering what was in the power of an infant to whom a day had been given to shew cause against a decree of foreclosure when he attained twenty-one, supposing the record to remain unaltered; and they held that in such a case he could not unravel the account, or redeem, and that the decree foreclosing his equity of redemption was not erroneous merely because he was an infant—in other words, that he could only shew the same error in the decree as he could have shewn had he been of full age when it was pronounced; but they did not intend to deny his right to put in a new answer, if he could state any fresh facts shewing that the decree ought not to have been made at all—as, for instance, that he had a title paramount to the mortgage. The text books so treat the matter. Mr. *Daniel* says, at page 243 of the English edition: “It is apprehended the above rule will not apply to cases where the title claimed by the infant is paramount to the mortgage;” and then he cites the case in *Mosely* as a binding authority. And Mr. *Coote* says, at page 525, “If he [the infant] shewed cause, he may put in a new answer. He cannot, however, go into the account, or redeem, but must shew error in the decree.” It cannot be supposed that Lord *Brougham* intended in the case of *Kelsall v. Kelsall*, to express the opinion, that an infant to whom a day had been given to shew cause against

Judgment

a decree of foreclosure, when he should attain twenty-one, had not the privilege conceded to all other defendants under the same circumstances, of making a fresh defence when he became of age. At all events, if he did mean to intimate such an opinion, it is sufficient to observe that that was not the point decided in that case, and therefore that in this respect it is not a binding authority.

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Upon the whole, as at present advised, I see no reason to doubt that the defendant in this case may, upon a rehearing, amend the decree by introducing the clause providing that he should be at liberty to shew cause against its being made absolute on his attaining twenty-one, and that under this liberty he may put in a new answer and make a fresh defence to the bill. The present motion, however, must be refused, with costs.

SPRAGGE, V. C.—The bill in this suit was filed by a mortgagee against the infant heir-at-law of the mortgagor, for the foreclosure of a mortgage. The infant put in the usual answer by his guardian. A decree of foreclosure was made, and the mortgage not having been redeemed, an order was subsequently made for the final foreclosure thereof against the defendant. Neither the decree nor the final order give a day to the infant to shew cause. The infant having recently—in December last—attained his majority, now applies by motion, that he may be let into a further defence in this suit, and to file a further and amended answer.

Judgment.

This application is opposed by the plaintiff, who contends that in a foreclosure suit an infant on coming of age is not entitled to open the account or to redeem, nor to shew anything but error apparent in the decree; and further, that even if entitled, still his mode of application is wrong—that he is in effect

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seeking to impeach a decree upon motion. This latter objection, I think, is well founded. There is a decree disposing of the infants rights in the matter, absolute in its terms, and upon the face of it binding upon the infant defendant. The disposition of the infants rights made by the decree, it is now sought to impeach—to review the decision of the court as expressed in that decree. Where a party feels himself aggrieved by a decree, his course is to rehear the cause, to appeal, or to file a bill of review, and in some cases he may file an original bill; but it is a principle of the court that (with the exception of clerical errors and the like) a decree cannot be altered or impeached upon motion. This seems sufficiently clear from the books of practice, and the authorities to which they refer.

Judgment.

If the decree in this suit be erroneous—as I think it is—in omitting to give the infant a day to shew cause, the infant is not without a remedy; he may impeach the decree in one of the modes I have mentioned, according to the circumstances. His course is so laid down in *McPherson on Infants*. page 430, supported by the authority of Lord *Eldon*, in *Perry v. Phelps* (a). It might at first sight appear that the giving an infant, by the decree, a day to shew cause, and providing for his having notice by subpoena after he comes of age, being for the infant's benefit, he should be at liberty to do that, in the absence of such provision, which he may do if the decree contain such provision; but when a day to shew cause is given, it is a leave to apply reserved—a decree *nisi causa*, and the infant defendant may apply by motion without infringing any rule: whereas if the decree be absolute in its terms, it would be an anomaly to impeach it by motion, as is in effect sought to be done by this application.

(a) 17 Ves. 178.

I have given some consideration to the question, 1851.
whether the infant can be admitted to put in a further
answer and make a new defence to this suit. It is
a question involved in considerable doubt. I am
inclined to think that he can be so admitted, to a
certain extent at all events: but I prefer to reserve
my judgment upon that point until it comes up for
decision upon a regular application. The present
application must, in my opinion, be dismissed, and
with costs.

v.
Herr.

After the court had refused the motion of the March 25.
defendant for leave to put in a new answer, he
presented a petition of re-hearing setting forth all
the proceedings that had been taken in the cause
and the facts above stated, and praying that the
cause might be re-heard for the purpose, and that the
decree already pronounced therein, and the final
order of foreclosure, might be respectively reversed
or altered, in respect of giving the defendant a day
to shew cause; and that he might be at liberty, either
without further application or to make application to
the court to be allowed, to put in a further or
amended answer to the plaintiff's bill, &c. And
the cause coming on for re-hearing, the same coun-
sel appeared for the parties. In addition to the cases
previously cited, the defendant's counsel referred to
and commented on *Powys v. Mansfield* (a) and
Trefusis v. Cotton (b).

Statement.

The plaintiff's counsel cited, in addition to the
former cases, *Plasket v. Beeby* (c), *Montgomery v.*
Rielly (d), and *Carpenter v. Demorest*, in this court
(1840).

Argument.

The opinions of their Honors on this point are more
fully given on the motion subsequently made for
leave to file another answer, so that it is considered

April 8.

Judgment

(a) 6 Sim. 637. (b) Mosely 306. (c) 4 East. 485. (d) 1 Bl. N.S. 392.

1851. unnecessary to state them further than to say that
 Mair the court [the Chancellor *diss.*] directed the decree
 v. to be amended by inserting the clause giving the
 Kerr. defendant a day to shew cause after attaining
 twenty-one.

April 20.

Statement.

The decree having been amended by the insertion of this clause, the defendant now renewed his motion for leave to put in an amendment or further answer to the bill.

The plaintiff, in opposition to this motion filed an affidavit denying the fact of usury—all knowledge of its being a trust estate—asserting that the mortgagor had, with the knowledge of *Margaret Fowles* and *Catharine Johns*, advertised for sale, and had sold, by auction, a portion of the land before giving the mortgage; and asserting that the present motion was made, not for the benefit of *Catharine Johns*, but for the benefit of other persons or another person who had bought her right.

Argument.

The same counsel appeared on this motion; and the cases mainly relied on were those already noted.

May 20.

Judgment.

THE CHANCELLOR.—This is an application on the part of the defendant—an infant at the time the decree of foreclosure was pronounced—to be permitted to put in a new answer, setting up two further grounds of defence—first, that the contract is tainted with usury, and therefore void; and, secondly, that the mortgagor was a mere trustee when he executed the security in question.

In disposing of the petition of rehearing in this cause, I was of opinion that in foreclosure suits an infant defendant is not entitled to have a day to shew cause. I had then the misfortune to differ from both my learned brothers; but an attentive and respectful consideration of their arguments has failed to con-

vince me that the opinion which I ventured to express in erroneous. If correct, it seems to me, in strictness, to conclude the present question.

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Kerr.

On that occasion I adopted the reasoning of the late Vice Chancellor of England in *Powys v. Mansfield* (a), considering it peculiarly applicable to the state of the law in this province, whatever might be its value as an English decision.

Real estate, here, being assets for the satisfaction of simple contract debts, under the statute of Geo. II.; all creditors—even those by simple contract—being enabled to obtain immediate payment from the real estate, notwithstanding the infancy of the heir; a decree for sale in a foreclosure suit, without giving an infant defendant a day to shew cause, being confessedly proper; the equity of the infant heir of the mortgagor being bound by a failure to pay the debt at the day appointed in a redemption suit;—such being the state of the law, it seemed to me, then, that it would be repugnant to reason, and directly contrary to the intention of the legislature, to hold an infant defendant entitled to this peculiar privilege, as against creditors of a class generally supposed to occupy an advantageous position—having specific security for their debts, and seeking the relief peculiarly appropriate to that security.

Judgment.

Price v. Carver (b) did not seem to me to be a decision in point in favor of the defendant. That was not a simple foreclosure suit. The bill was filed by an equitable mortgagee. A conveyance from the infant was therefore necessary; and that could not have been ordered until the infant should have attained his age. It was like the case of *Spencer v. Boyes* (c).

(a) 6 Sim. 640. (b) 3 M. & C. 157. (c) 4 Ves. 370.

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But, assuming the observations of Lord *Cottenham* in that case, to be favorable to the then application, and binding, they seemed to me inapplicable. It seemed to me that the day to shew cause had been taken away here—in effect, although not expressly—by the statute of Geo. II., and not by that of Wm. IV.; and whatever doubt might be entertained as to the Vice Chancellor's reasoning in *Pewys v. Mansfield*, in relation to the latter statute, it seemed to me, upon grounds to which I shall again advert presently, that its soundness, as applied to the former statute, could not be doubted.

Such were the grounds of the opinion I then expressed. To that opinion, with great respect, I still adhere. And if the decree of foreclosure, without giving a day to shew cause, would have been proper, it follows, I think, that this application should be refused.

Judgment

But, assuming the latter question not to be concluded by the former, I am of opinion that the defendant has not made out a case for the indulgence he asks.

The present motion proceeds upon the assumption that a special case must be made to warrant the order now asked. Affidavits have been filed with that object. In my opinion, the practice is as it has been assumed (a); and inasmuch as the affidavits seem to me to have failed to establish such a case, the motion must, I think, fail.

The learned counsel for the defendant contends that in foreclosure suits infant defendants, on attaining their age, are entitled to set up any defence which might have been made at the original hearing;

(a) *Kelsall v. Kelsall*, 2 M. & K. 414; *Malone v. Malone*, 8 C. & F.

but it is plain, I think, from the authorities, that foreclosure suits are exceptional; in such suits, infants can only shew error in the decree (a). The precise meaning of that expression need not now be discussed. That it is not to be understood in the manner contended for by the learned counsel for the defendant, is, I think, apparent. If an infant defendant may, on attaining his age, open the whole case, why may he not unravel the account?—why may he not redeem? Error in the account may be as apparent, and as fatal to the interest of the infant, as in any other part of the case. The neglect to redeem may be as improper and injurious. But all the cases, and also the text writers, appear to me to negative any such right. Indeed, the opposite opinion would seem to involve an absurdity. It has been settled, not at once, but after some fluctuation of opinion, that a creditor may have a decree of foreclosure notwithstanding the infancy of the defendant—in other words, a decreed foreclosure against an infant defendant is not error (b). But if the whole can be opened on the infant attaining his age, of what value is the decree of foreclosure? The reasonable conclusion from such premises would have been, that a decree of foreclosure during infancy was erroneous.

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This question, however, as well as the former, seems to me to depend, to some extent at least, upon considerations growing out of the statute of Geo. II. In speaking of that statute I speak of it as it has been interpreted by the Court of Queen's Bench of this province. I cannot regard the question of its construction, in the light I am now viewing it, as any longer open. Great ability and learning were

(a) Kelsall v. Kelsall, 2 M. & K. 414; Mallock v. Galton, 3 P. W. 352; Bishop of Winchester v. Beaver, 3 Ves. 314; Williamson v. Gordon, 19 Ves. 114, 1 Danl. C. P. (Eng. ed.) 243; Powell on Mortgages, 982; Coote on Mortgages, 524-5.

(b) Williamson v. Gordon, 19 Ves. 114.

1851. brought to bear upon it in *Gardiner v. Gardiner* (a);
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Kerr. and it would be of mischievous consequences, in my
opinion, were we to treat a case so solemnly decided,
and acted on for so considerable a period, as open to
further discussion here.

Judgment. Now, the provisions of the statute of George II.
are widely different from those of the statute of
William IV. The latter conferred upon courts of
equity further powers of dealing with real estate for
the satisfaction of debts. There are strong reasons
for the conclusion drawn by Lord *Cottenham*, that
such powers must be exercised according to the
established practice of the court. But the statute of
George II. altered, in some important particulars, the
character of real estate. It gave increased power of
dealing with such estate to courts of both law and
equity. The object of the statute was to facilitate
the "proving, recovering and levying of debts." By
it, real estate was made liable to the satisfaction of
even simple contract debts in some sort as personal
estate. Simple contract creditors are empowered
not only to establish their right to recover, but to
obtain satisfaction of their debts by sale of the real
estate during the infancy of the heir, and in a pro-
ceeding to which he is not a necessary party. Can
we suppose that the legislature, while making these
extraordinary provisions for the protection of credi-
tors in courts of law, intended to leave the equitable
right of mortgagees in the unsatisfactory position in
which the present argument would place them—not
only denying them the relief appropriate to their
contract during the minority of the infant mortgagor,
but keeping the whole question of the defendant's
liability under the contract open during the same
period?

(a) 4 U. C. Rep. 520.

We are all of opinion that there is nothing in the statute of George II. or the decisions of the Court of Queen's Bench, to deprive the infant heir of a debtor, having assets by descent, of his right to file a bill in this court for the administration of the estate, as well for the purpose of having the debts to be charged upon his estate proved in his presence, as also for the purpose of enforcing the application of the personal estate in the first instance. But, upon the argument now addressed to us, a sale under the decree of this court, in such an administration suit, would be conditional during the minority of the infant (I speak with reference to the effect of the statute of Geo. II. exclusively); while the Sheriff, acting under common law process in favour of a simple contract creditor, would be able to make an absolute title at once. The legislature cannot be supposed to have intended the introduction of any such anomaly. The statute has authorized the sale of real estate, under common-law process, to satisfy the simple contract debt of the ancestor, during the infancy of the heir, under common law process, and in a proceeding to which the heir is not a party. Must it not be considered as having in effect abolished the day to shew cause in this court, where the infant is a party, by his guardian, bound to protect his interest, and responsible for neglect? And if the statute of George II. is to be construed as having impliedly deprived the infant of a day to shew cause, where a sale is directed for the satisfaction of a simple contract debt, the same consequence follows, *a fortiori*, as it seems to me, in foreclosure suits.

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This reasoning convinced me, upon the petition of rehearing, that decrees of foreclosure in this province ought not to contain the clause giving a day to shew cause. But, although insufficient to establish that proposition, it is, I think, of weight in determining the other question, and strengthens the conclusion

1851. which has seemed to me deducible from English authorities—namely, that foreclosure suits are exceptional; that in such suits infant defendants can only shew error in the decree; and that this defendant is therefore precluded from disputing his liability under this contract, upon the ground of usury.

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Upon the other point I agree with my brother *Spragge*, that the affidavits do not present such a case as would warrant us in permitting the defendant to put in a new answer, and I am therefore of opinion that the motion must be refused, with costs.

Judgment.

ESTEN, V. C.—The decree having been amended in this case by reserving a day to shew cause to the infant, the present application is for liberty to put in a new answer under that reservation. I had a strong impression on the former occasion, that under such a provision the infant is enabled to put in a new answer and make any defence that he could have made had he been adult, when the former answer was filed; and I have seen no reason to alter that opinion. I do not wish to express any opinion as to whether an infant defendant has in every case, whether liberty is reserved to him to shew cause against the decree or not, a right when he becomes of age to put in a new answer to the bill; and whether the reservation of the day to shew cause in the cases in which it is contained in the decree, is anything more than a qualification of the decree as it affects the infant, intended only to guard against his being concluded by it, in contravention of his inherent right to object to it when adult. My brother *Spragge* and myself thought, as the decree was clearly erroneous, and ought to have given a day to shew cause, it was safer to have it set right by introducing that reservation, as thereby we should keep within the limits of the authorities, whatever law there might be beyond them to warrant what the defendant

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asked. The decree having been amended in this respect, the question is, what rights this provision confers on the defendant, and whether he is or not thereby enabled to put in a new answer, and if so, what species of defence he may thereby set up. It is admitted that in every other case than that of a foreclosure, an infant under liberty to shew cause against the decree can put in a new answer and make any defence that he may be advised to make. The causes of *Fountain v. Craine* (a), *Bennett v. Lee*, (b), and even the late case of *Kelsall v. Kelsall*, are too clear upon this point to admit of a moment's doubt. But it is contended that a foreclosure suit is an exception to the general rule, and that an infant defendant has not the same rights in such a suit that he has confessedly in every other. No reason is assigned for this supposed distinction. The learned counsel for the plaintiff attempted to account for it on the ground of the legal estate not being in the infant, which caused him to enjoy less privileges than he otherwise might. This suggestion shews indeed the ingenuity of the learned counsel in endeavoring to account for what is wholly unaccountable, but nothing more. The truth is, his argument works the other way. The circumstance of the legal estate not being in the infant, if it produced any effect at all, should, in accordance with all the authorities, prevent altogether the day to shew cause from being given. To give it in such a case is a departure from the ordinary rule, evincing such an extraordinary tendency as for the rights of an infant mortgagor as certainly furnishes no argument for a restriction of his privileges under such a provision, but directly the reverse. An infant defendant in a foreclosure suit may have the best possible defence to offer to the bill such as fraud, usury, illegality in the constitution of the debt, or paramount title; and it would, I

(a) 1 P. W. 504. (b) 2 Atk. 487.

1851. think, be monstrous to exclude him from these defences, every one of which may have been unknown to or overlooked by his guardian.

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But reliance is placed on the language which has fallen from different judges, appearing or supposed to import that an infant defendant in a foreclosure suit cannot make a fresh defence to the bill when he attains his full age. Much misapprehension and difficulty arises from not observing that sound rule, which requires everything to be construed with reference to its subject-matter and the occasion upon which it was said. Judges frequently use language which sufficiently answers their present purpose, without being at the pains to guard it with such minute accuracy as to preclude the possibility of its misapplication in any case that may arise. That the language in question has been extended beyond its true meaning, is to me very obvious. To be convinced of this, it is only necessary to attend to what is said by the text writers upon this subject. Mr. Coote says, at pages 524 and 525 of this book on mortgages, that an infant defendant "needs not wait until twenty-one to shew cause against the decree. He may by his *prochein amie* shew cause at any time. If he shews cause, he may put in a new answer. He cannot, however, go into the account or redeem, but must shew error in the decree." Now it is perfectly obvious from this passage that Mr. Coote considered the right to put in a new answer and make a fresh defence, and the being obliged to shew error in the decree, as perfectly consistent and compatible things; from which it necessarily follows, either that the shewing error in the decree involves when necessary the making a fresh defence, or that the being precluded from anything but shewing error in the decree is confined to cases in which no new defence is set up. For the position, too, that an infant defendant in a foreclosure

suit may put in a new answer, Mr. Coote, cites the case of *Bennett v. Lee*, which was not a case of mortgage at all; evincing thereby that in his opinion no distinction existed in this respect between foreclosure and other cases. In like manner Mr. Powell, in his book at page 680, says "but when he comes of age and shews cause within the six months, he may upon motion put in a new answer and make a new defence;" and adds, a little further on, "but when he comes of age he will not be permitted to go into the account, nor will he be so much as entitled to redeem by paying what is reported due; but will be only entitled to show an error in the decree, or that it was unjust;" to which language precisely the same remarks are applicable as to that of Mr. Coote. The truth is, it was formerly considered that a decree of foreclosure was not binding on an infant, but that he could when he became of age redeem the property mortgaged in the same way as if no such decree had been pronounced. This error was afterwards corrected; and it became established that a decree of foreclosure was as effectual against an infant as against an adult, unless he can shew that under the circumstances it ought not to have been made.

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To all this weight of authority and reason is opposed nothing, so far as I know, but the solitary dictum of Lord Brougham in *Kelsall v. Kelsall*. I need not say that this case is not a binding decision on the point in question, since it decided no such point whatever, but merely that in a creditor's suit an infant defendant who has had a day given him to shew cause may put in a new answer.

I am very clearly of opinion that an infant defendant in a foreclosure suit has the same privilege as an infant defendant in any other suit. The sole foundation for a contrary supposition appears to have

1851. been the expression found in the cases of *Mallock v. Galton*, *Lyne v. Willis* and *Williamson v. Gordon*, that an infant under liberty to shew cause "can only shew error in the decree." It is to be observed that these words are never, I believe, found by themselves, but always follow the words "but the infant cannot unravel the account or so much as redeem the mortgage," and I apprehend they are used antithetically to those words, and with no more extensive meaning. They do not import that a new answer cannot be made to the bill, and neither Mr. Coote nor Mr. Powell understands them in that sense. Mr. Daniel seems to do so, but then he admits that the rule which they express is confined to cases where the infant is bound by the mortgage. The learned counsel for the plaintiff adopts Mr. Daniel's opinion without its qualification. The only warrant for this theory then, seems to be the probable suggestion of counsel in the case of *Kelsall v. Kelsall* (which however is not stated by the report, but is perhaps to be inferred from the judgment), and the Lord Chancellor's assumption of its correctness in deciding that particular case. I do not think that the Lord Chancellor had considered the point or intended to lay down any rule with respect to it, but merely meant to say, that, assuming the rule to be as stated, it did not govern that case. So far as I have been able to discover, there does not appear to me to be the shadow of authority for any distinction between foreclosure cases and other cases in this particular, and reason and common sense are entirely opposed to any such distinction.

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I am clearly of opinion, therefore, that in general an infant defendant to a foreclosure suit ought to be permitted, when he attains twenty-one, if he desire it, to put in a new answer and make a fresh defence to the bill; this would appear to be a matter of

course (a); but supposing it to be necessary to make a special application, and that the court has a discretion to refuse or to grant it, the question arises whether, under the circumstances of this case, the court would be warranted in admitting the particular defences which it is proposed to offer. This question presents itself in two points of view—first, as respects the relation of the parties; and secondly, as regards the nature of the defences themselves. To consider the latter part first:

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I stated in my judgment upon the former application in this case, that it was not absolutely necessary to grant this application in order to raise the defence furnished by the existence of the alleged trust; because, supposing it to exist, the *cestuis que trustent* are not bound by the decree, and can file a bill to set aside the mortgage, or to redeem, according as the mortgagee had or had not notice of the alleged trust. But this circumstance is entirely accidental, and creates no necessity for deviating from the course ordinarily pursued on these occasions. Besides if the fact of the alleged trust be true—and we must suppose it to be true where there is a possibility that it may be so—the decree has been pronounced without hearing those who ought in the first instance to have been heard against it. In this respect the present case differs from the one in *Mosley*, where, if the mortgagee had not notice, the decree was right and the infant was bound; but here, even if the mortgagee had no notice, the *cestuis que trustent* ought to have been before the court, and in fact to have defended the suit. The other defence is usury, which, as a general rule, the courts are not disposed to favor; but I understand the principle upon which this rule is founded, to be, that when a party, having the defence of usury, fails, through a slip or neglect of

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(a) See 1 Dan. 245.

1851. his own to set it up, the courts will not afford him an extraordinary opportunity of doing so.

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But how can neglect be attributed to an infant, or to the *cestuis que trustent*, who were not before the court? Whatever the infant would be permitted to do for himself, he should, I think, be permitted to do for his *cestuis que trustent*.

I think, therefore, that the defendant ought to be admitted to raise both these defences, unless there is something in the facts of the case, as they appear by the affidavits, to make it improper. I have read the affidavits, and do not think there is anything of this nature in them.

Judgment. With respect to the effect of the statute 5 Geo. II., I have been unable, after the best consideration that I could give the matter, and with the utmost respect for the opposite opinion, to arrive at the conclusion that this question is effected by it.

SPRAGGE, V. C.—It is difficult to deduce from the cases any clear intelligible principle upon which infants have been allowed, on coming of age, to shew cause against a decree made during their minority. In a number of the cases cited, the case of an infant defendant in a foreclosure suit is treated as an exceptional case, and that in two points of view—the one, in the infant having a day to shew cause at all; the other, in his being restricted to shew only certain matters for cause.

It would appear but reasonable that an infant entitled to shew cause against a decree should be permitted to show anything that would make it manifest that the decree ought not to have been made against him—that his right should not be bound by proceedings against him when not of age to defend

himself. In *Savage v. Carrol* (a), the Lord Chancellor of Ireland speaks of the defence made by a guardian for an infant, as not to be considered exactly as a defence, but rather as the appearance of a mere formal party before the court; and the language of Lord Brougham in *Kelsall v. Kelsall* (b), is to the same effect. He says, "A decree against an infant is erroneous if it has not the clause 'unless cause be shewn within six months.' Now, this either means nothing, or it is intended to secure the infant against any proceeding taken to his prejudice at a time when the law supposes him to be absent, or at least not present in such a manner as to be capable of defending his rights." And so in each of those cases, as well as in *Bennett v. Lee*, the infants were allowed, on coming of age, to make a new defence to the suit, notwithstanding that a decree had been made against them.

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Why an infant defendant in a foreclosure suit should occupy the anomalous position of having a day to shew cause, and yet be restricted in shewing cause, I have not seen explained; but that he is restricted, appears, I think, from a number of cases. In *Malloch v. Galton* (c), the Lord Chancellor laid it down as agreeable to the constant practice, that though an infant is entitled in a foreclosure suit to shew cause against the decree, yet he is not when he comes of age to travel into the account, nor is he so much as entitled to redeem the mortgage by paying what is reported due, but is only entitled to shew error in the decree; and in the case of *Lyne v. Willis*, noted at the foot of the above report, it is said that this was admitted by the counsel on both sides, and also by the court to be the settled practice. So also in a note to *Booth v. Rich* (d), it is said, "The infant is only entitled to shew error in the decree.

(a) 1 B. & B. 552. (b) 2 M. & K. 411. (c) 3 P. Wms. 352. (d) 1 Vern. 295.

1851. He may not unravel the account nor is he entitled to redeem." In the *Bishop of Winchester v. Beavor* (a), the Master of the Rolls says that an infant may be foreclosed:—"You can have your decree against him; he can do nothing but shew error; he is foreclosed to all intents," &c. In *Goodier v. Ashton* (b), it was treated by counsel as a thing well understood, that an infant defendant having a day to shew cause, could only enable him to shew error in the decree; and Lord Eldon in *Williamson v. Gordon* (c) says, "The infant has only six months to shew cause against the decree; but he cannot do that if the decree would have been right against him had he been adult. He can shew nothing but error in the decree," &c.

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In *Kelsall v. Kelsall*, it appears to have been argued from, as settled law, that an infant defendant in a foreclosure suit can, on coming of age, only shew error in the decree. The suit was by creditors, and sought to obtain payment of debts out of the real estate devised, and counsel seemed to have urged that there was an analogy between creditor's suits and foreclosure suits, and that inasmuch as a defendant in the latter could not make a new defence, so he could not in the former; and Lord Brougham, while denying the analogy contended for, said "that an infant may be foreclosed, and cannot in shewing cause travel into the account, but only shew error in the decree, has been laid down by many of the judges in this court."

Thus, from the year 1734 downwards, it has been treated as the settled rule of the court, that infant defendants in foreclosure suits stand upon a different footing from other defendants having a right to shew cause against a decree; that there is a qualified

(a) 3 Ves. 314. (b) 17 Ves. 83. (c) 19 Ves. 114.

right, restricted within narrow limits. It is true that this point was not, in any of the cases cited, the point for decision; but its being all along treated as a settled rule, as a thing not questioned, and used for the purpose of illustration, appeals to me to be at least as strong as an express decision. Either the defendant has not such right, or, as was observed by Mr. *Mowat*, the judges have expressed themselves with singular inaccuracy in what they have said upon the subject. Whether the reason for this anomalous position is founded on a policy similar to that which dictated the statute 1 Wm. IV. c. 47, or in order to avoid to wide a difference in the effect of a decree for foreclosure and a decree for sale, or whatever else the reason may have been, does not appear. I look upon the rule as too well settled to be questioned now.

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Where, however, the infant defendant claims by title paramount to the mortgage, he stands upon a different footing; and so in the anonymous case in *Mosley*, p. 66, the infant defendant was allowed on coming of age to show his paramount title. He did not claim under the mortgagor, who was his father, but under his grand uncle, who had paid for the land in question, and devised to the grandfather for life, remainder in tail male in fee; and the infant claimed in remainder, and alleged upon oath on his application to make a new defence, that he believed he could prove that the mortgagee was aware when he took the mortgage of these circumstances. What the infant in that case had, was not an equity of redemption which could be foreclosed, but an independent title which he could, I apprehend, have asserted by original bill. The mortgage of the grandfather could be good only for his life, and then the remainder-man had his equity—not to redeem, but to come in of his own title. So that that case was not one between mortgagee and infant heir of mortgagor;

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and the rule restricting what the latter may do by way of shewing cause against the decree may not be applicable to such a case. Indeed *Macpherson*, in his work on infants, and Mr. *Daniel*, consider that the restrictions applicable to ordinary cases, where the infant claims under the mortgagor, do not apply to such a case as this. The former author, after stating the general rule that, after a decree of foreclosure, an infant is not permitted to open the account or to redeem the mortgage by paying what is reported due, and that he can shew no cause but error in the decree, proceeds to say that this restriction does not of course extend to cases of fraud, nor to any case in which the plaintiff and the infant defendant did not indisputably stand when the decree was made in the relation of mortgagee and mortgagor, or heir or devisee of the mortgagor. And Mr. *Daniel* (a), after stating the general rule in substantially the same terms, proceeds thus: "Neither, it is apprehended, will the above rule apply to cases where the title claimed by the infant is paramount the mortgage," and both these writers refer to the case in *Mosley* as authority for their position. In this case the defendant, now of age, asks to be permitted to put in a new answer and defend the suit, in order that he may shew that his father, who made the mortgage, was trustee and not owner, of the premises in question, and consequently had no right to pledge them for his individual debt, and that the trust has descended upon him. He also desires to shew that the transaction was usurious. I cannot agree with Mr. *Turner* that usury is a matter paramount the mortgage. It certainly is not so in the sense in which the words are used in the authorities referred to.

I understand his Lordship the Chancellor to be of opinion that the operation of the statute 5 Geo. II. c. 7, must be to deprive infant defendants in foreclosure

(a) Danl. Prac. 221.

suits of a day to shew cause; that while under that statute a sale under common law execution of the real estate, descended or devised, may take place presently, it would be unreasonable to hold that in this court in a foreclosure suit the lands should be tied up perhaps for a number of years, until the infant heir of the mortgagor should come of age. With great deference to his lordship's opinion, I apprehend that a just deduction from the statute would be, that a judgment creditor having in a court of law a right to sell the lands of the deceased debtor, it would be reasonable to hold that a mortgagee had a similar right in this court—that he may come for a sale as a matter of right by analogy to the common law right, and in the spirit of the statute. It has been so held in this court in the case of adult defendants, and no good reason has occurred to me why the same should not be held in the case of infants.

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If, however, a mortgagee chooses to ask, not for a sale but for a foreclosure, he makes his election, perhaps for very good reasons of advantage to himself; and he must in such a case take a foreclosure with its ordinary incidents and consequences, and cannot reasonably complain if he has not the advantages of both modes of proceeding.

Upon the best consideration that I have been able to give to the subject, I am of opinion that the defendant is not now entitled on coming of age to shew usury as a defence to this suit. Further, I am of opinion that he would have been entitled to shew the trust in this case as a defence if he had upon his affidavits made a case for it. The case he has made is just that defence which was actually made for the infant in the case reported in *Mosley*, and which, upon hearing upon bill and answer, was adjudged against him. The gist of his application

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on coming of age was that, he believed he could prove that the mortgagee was aware of the facts stated in his former answer. This important point (notice to the mortgagee) is wholly omitted here, and this although the defendant's counsel was cautioned to look at his affidavits, as it was doubtful if they were not defective. I take it to be a fair inference that, as a matter of fact, the mortgagee in this case had no notice. Taking then the facts to be, that there was a trust, but that the mortgagee had no notice of it, he was entitled to his mortgage money and to a foreclosure in default in payment. *In the case as made* there has been no error in the decree, either error apparent or error in judgment; and if the facts now relied on for defence had been made matter of defence by answer, and had been admitted, the decree, according to the case in *Mosley* relied on for the defendant, must have been the same. Lord Eldon said in *Williamson v. Gordon*, that an infant cannot shew cause against the decree if the decree would have been right against him had he been adult. If the defendant in this case had been adult, would not the decree have been right against him even if he had proved the trust he has asked leave to prove—failing, as he has here, to prove notice? How far it could have been effectual to vest a good title in the mortgagee is another question; and it is of course a question now, whether the *cestuis que trustent* may not file their bill against the mortgagee (or even whether this defendant may not), and redeem him if he had no notice, or recover the mortgage premises if he had. Upon this, however, I express no opinion. The present application, I think, fails in the important particular to which I have adverted.

Per Cur. (ESTEN, V. C., *diss.*)—Motion refused, with costs.

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Practice—77th Order.

In a cause in the nature of a redemption suit, the bill stated the existence of three several mortgages; alleged one to be usurious, and the two others to have been made to secure larger sums than had been advanced; prayed special relief, and that an account might be taken of the sums actually advanced and of the amount due; and for redemption: A motion for an immediate decree under the 77th order of May, 1850, was refused, with costs.

The statements of the bill, the nature of which and the relief sought are fully set forth in the judgment, was verified in the usual manner by affidavit, and no answer had been put in. In moving for a summary reference under the 77th order of May, 1850, Mr. Mowat for the plaintiff.

The bill is filed, *inter alia*, for redemption of the mortgaged properties, on paying what is really due; alleging that one of the mortgages is usurious, and the others, though not usurious, were made to secure sums much larger than were ever advanced. The right to relief thus depends, in any view of the matter, on the state of the accounts between the plaintiff and defendant, and this can be much more satisfactorily ascertained in the Master's office than before the court.

It is competent for the Master to make this investigation under the ordinary decree of reference. *Penn v. Lockwood* (a) is a clear authority on this point; and whatever relief is asked by the bill other than what depends on the result of such account, he plaintiff is willing to waive.

Mr. McDonald for defendant. The 77th order does not apply to this case. The suit is substantially for the reformation of deeds—that is, lessening the interest of the defendant; besides, whatever

(a) Ante vol. I, p. 547.

1851. amount may be or ought to be secured by the conveyances, no portion of it is yet due, and a mortgagee cannot be called upon to discharge the mortgage until the money is due.

Kelly
v.
Mills.

May 10.

THE CHANCELLOR.—This is a motion for a summary reference under the 77th order of May, 1850.

Judgment.

There are three distinct mortgage transactions, in relation to each of which relief is asked.

With respect to the first, the bill—after narrating the plaintiff's title to a certain leasehold property; an agreement for building thereon between the plaintiff and defendant; the cessation thereof after it had been in part executed; the ascertainment of a sum to be paid to the defendant, as the purchase money "*for what he had already expended on the building*"—such is the expression in the bill; and a contract for a loan of four hundred pounds;—after that narration, the bill states an indenture by way of mortgage executed on the 5th of January, 1848, between the plaintiff and defendant, by which the leasehold premises in question were conveyed to the defendant, subject to redemption on payment of the sum of 1400*l.* at the expiration of fourteen years, as also an annual sum of 150*l.* in the interim, by half-yearly payments.

With respect to this security, the bill alleges that the sum to be loaned was not advanced, either in cash or its equivalent. I am uncertain, however, whether any relief is asked on that ground; but it is affirmed that the only consideration for the deed was a sum of 1300*l.*; and the plaintiff seeks to have the security reduced to that extent, and asks an injunction.

The second mortgage was executed on the 14th of May, 1848, for securing the sum of 1000*l.* in twenty-

one years from the date, with interest in the meantime half-yearly. With respect to this security, it is alleged that the principal money was not paid in cash, but by the delivery of goods and the assignment of securities of various kinds. These goods are alleged not to have been worth one-fifth of the sum for which they were sold; and many of the securities are said to have been valueless. The bill further states that the plaintiff was required, in consideration of this accommodation, to accept a lease from the defendant of certain premises, and to become bound for the erection of certain buildings thereon; with which conditions he is represented as having been obliged, from his necessities, to comply. The rent reserved by this lease is alleged to be greatly beyond the true value of the premises; and this part of the transaction is represented as a mere contrivance to secure usurious interest. The relief sought in relation to this dealing is, that the lease and bond may be cancelled and all "*improper charges*" deducted from the security.

1851.

Kelly
v.
Mills.

Judgment.

An action has been already brought upon these securities and judgment recovered, to restrain which the injunction is asked.

The third mortgage bears date, so far as I can gather, the 4th of May, 1849. In relation to this security, the plaintiff says that, being in want of a loan of 250*l.* on the 4th of July, 1849, he applied to the defendant, who agreed to make the required advance—not, however, altogether in cash, but in part by the conveyance of a parcel of land. The plaintiff also states that the above proposition was accompanied by a further stipulation that the defendant should receive a bonus of 87*l.* 10*s.*, and that for the purpose of evading the usury laws the plaintiff should execute a mortgage to one *Robert Kelly* to secure the sum to be advanced, together with the

1851. bonus (337*l.* 10*s.*), which security should be assigned to the defendant; and that the mortgage in question was accordingly so made and assigned. The plaintiff alleges that the land conveyed to him in pursuance of the contract was in reality worth only the sum of 75*l.*; and he asks to have the security cut down by deducting the sum so overcharged, as well as the illegal bonus.

Kelly
v.
Mills.

Judgment.

The prayer of the bill is in these words—"To the end therefore that the said lease and bond so executed may be rescinded and set aside, and may be delivered up to be cancelled; and that the said mortgages may respectively be rectified by reducing the sums secured thereby to the true sums due and payable in respect thereof, after deducting all improper charges from the mortgage monies secured by the second mortgage, and after deducting from the first mortgage all sums included therein, over and above the said sum of 1300*l.* and legal interest thereon; and from the third mortgage all sums included therein over and above the said sum of 250*l.* and interest thereon; and after further deducting from the 250*l.* and interest, the difference between the actual and alleged value of the lot of land which formed part of the consideration for such last mentioned mortgage; and that the instalments and interest under the said mortgages from time to time as thereby provided, may be reduced and adjusted accordingly, in which case your complainant hereby offers to pay all arrears, if any there may be said to be; or that the said mortgages may be wholly set aside, and may be delivered up to your complainant to be cancelled, and an account taken of what is legally and justly due in respect of such transactions as aforesaid; and if necessary, your complainant hereby offers to pay the same at once, or as the court may direct: or that, upon such payment as last aforesaid, the defendant may be ordered to convey the

mortgage premises to your complainant, free and clear of all incumbrances done by him or any claiming by or under him; and that in any event, the said mortgages may be decreed to stand as securities for such sums only as shall remain due after deducting the sums included therein or paid thereon, for interest or otherwise, over and above the sums actually advanced or legally due on the same respectively and legal interest thereon only, and after making all other just allowances; and that in any event, the defendant may account for all sums of money paid to or received by him on the said mortgages; and that all proper inquiries may be directed and accounts taken for the purpose of carrying into effect such decree; and that the defendant may be restrained from proceeding further with the said action, or taking any other proceedings at law in respect of the matters aforesaid, or any other; and for further relief."

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v.
Mills.

Judgment.

Upon this bill the plaintiff moves, that it may be forthwith referred to the Master of this court to take the accounts necessary or proper to be taken in the cause before the court can proceed to the ultimate decision of the case, and thereon that it may, amongst other things be decreed that an account may be taken of the sums actually advanced or legally due on the mortgages in the pleadings mentioned, and for which the same should stand as securities to the defendant, and legal interest on such sums; and of all sums paid to or received by the defendant on the said mortgages; or that such other order may be made in the premises as this court may deem meet."

Now, without enquiring whether the plaintiff has stated a case for equitable relief—as to which we express no opinion—and without considering whether, independent of other objections, a matter of this

1851. complicated character could be satisfactorily disposed of by summary reference—without determining either of these points, it appears to us obvious that the case stated by the bill comes neither within the spirit nor the letter of the order.

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Mills.

Regarded as a redemption suit—although we do not perceive that it can be properly viewed as such, or if so viewed that it can be sustained—but regarded as a redemption suit, can it be said as to all, or indeed as to any of these securities, that the state of the account, or the state of the account and the priority of incumbrances, form the only subject of enquiry?

This, clearly, is not a suit for an account; and regarded as a suit to reform these securities, or to set them aside on account of fraud, what account can the court direct before the plaintiff shall have laid the necessary foundation by proof of the case of which the account is only a consequence?

Judgment

Consider it with reference to the last security, what is the relief the plaintiff asks? The allegation is, that a transaction, which, upon the instruments appears as the transfer of a mortgage security from *Robert Kelly* to the defendant, was in fact a loan from the defendant to the plaintiff; and that it was made to assume its present form only for the purpose of evading the usury laws. Now, it seems to us too plain to admit of argument, that the question as to the *bona fides* of this transfer must be determined by the court in the regular way, before any matters of account can be referred to the Master. Again, it is alleged with respect to the same security, that the consideration consisted in great part of land, estimated much beyond its real value; and the plaintiff seeks to have the security cut down accordingly. Now this course is not alleged to have been a device

to evade the usury laws. Indeed, the facts would seem to negative that supposition. If the security is to be cut down, therefore, it must be, I presume, on account of some fraudulent practice on the part of the defendant. But, assuming that to be the ground of the relief, it is obviously a question for the determination of the court, and not the subject of a reference to the Master.

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The same observations apply to the second transaction. It is similar in principle, though somewhat different in its circumstances. There, it is said, the lease and bond formed part of the mortgage dealing though apparently unconnected with it. Surely that question cannot be said to be dependant upon any account to be taken before the Master. Neither would its determination be facilitated, so far as we can perceive, by such a reference, if that would suffice, which we by no means intend to intimate.

Judgment.

Then, as to the allegation that the goods and other particulars which constituted the consideration mentioned in the mortgage deed were greatly overvalued, and accepted by the plaintiff under the pressure of extreme necessity, the jurisdiction to open transactions of this sort when tainted with fraud, either actual or constructive, is undoubted. But, in that view, we are at a loss to discover the principle upon which an immediate reference is asked. This court does not assume to make a new contract for the parties. In the absence of fraud, or what is considered equivalent to fraud, this court has no jurisdiction to institute an enquiry as to the actual value of these goods and securities. If the jurisdiction be invoked on the ground of fraud, surely that case must be established before any such enquiry can be instituted.

We need not now consider the relief asked in

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v.
Mills.

Judgment.

respect to the first mortgage, because it is manifest from what has been already said that the court is not at present in a position to pronounce any decree, or direct any account to be taken. Some of the observations which have been made with respect to the other branches of the case do not seem to apply to that, but others appear to us to apply with equal force; and we incline to the opinion that, had the suit related to that transaction alone, it would not have been the proper subject for a summary reference.

We are of opinion that the motion must be refused, with costs.

FISHER v. WILSON.

Trustee—Costs.

Ap il 4.

Where a trustee set up an improper claim to the property, the subject of the trust, and a bill was filed to compel him to deliver up possession and account—the court charged him with the costs of suit up to the hearing, reserving the consideration of interest and subsequent costs.

Statement.

The facts of this case are fully set forth in a former report (a).

Argument.

The cause now coming on for hearing, Mr. McDonald, for the plaintiff, asked that the decree might direct the defendant to pay the costs of suit and interest on the sum found remaining in his hands, citing for authority for what was asked *Thorby v. Yeats* (b), *Willis v. Hiscox* (c), *Angell v. Davis* (d), *Willson v. Willson* (e), *Cummings v. McFarlane* (f), *Newton v. Bennett* (g), *Raphael v. Boehm* (h), *Ers-kine v. Campbell* (i).

Mr. R. Cooper, for defendant, objected to the plaintiff now seeking to charge the defendant with interest and costs, not having asked that by his bill, the defendant having acted in error, and not with

(a) Ante vol. 1, p. 218. (b) 1 Y. & C. C. C. 438. (c) 4 M. & C. 197. (d) 4 M. & C. 360. (e) 2 Keen, 249. (f) Ante, 151. (g) 1 B. C. C. 359, and note to page 362. (h) 13 Ves. 408. (i) Ante vol. 1, p. 576.

any improper motive— and cited *Sammes v. Ryckman* (a), *Knight v. Martin* (b) *Bruere v. Pemberton* (c), *Wolfe v. Findlay* (d), *Campbell v. Horne* (e), and *Lewin on Trusts*, 457.

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v.
Wilson.

ESTEN,* V. C.—The only question in this case relates to the costs of the suit, and I am very clearly of opinion that they ought to be paid by the defendant. The facts of the case are fully detailed in the judgment delivered by me upon the motion to dissolve the injunction, and it is unnecessary now to repeat them. It is perfectly clear that, upon the death of the plaintiff's wife, the plaintiff became entitled to the property in question in this cause, either *jure mariti* or as administrator to his wife, if she had died without making a will. That she made no will is now admitted, and under the circumstances of this case it would be improper to act upon the supposition that the defendant might have believed that such was not the case. When the plaintiff demanded the possession of the property, the defendant might have answered that some of the articles mentioned in the notice had never been in his possession, and that he was entitled to an allowance in respect of his expenses, and of any debts that he may have paid of the testator. He makes no such demand, but positively refuses to yield up possession of the property, on the ground—first, that there was a will; second, that if there was none he was entitled for his own benefit: the first ground being untrue in fact, the second totally unfounded in law. This conduct must be considered as having occasioned the suit; for I hold it to be a sound rule of construction, that if a party entitled to make a certain demand does not make it, but makes one which is wholly unwarrantable, with which the

Judgment.

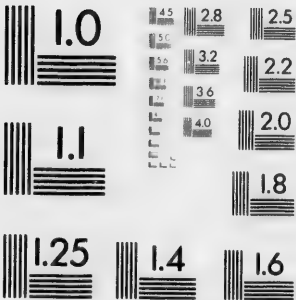
(a) 2 Ves. jr. 36. (b) 1 R. & M. 70. (c) 12 Ves. 386. (d) 6 Hare, 66. (e) 1 V. & C. C. 664.

* The Chancellor was concerned in the cause while at the bar.



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1851. *Fisher v. Wilson.* other party refuses to comply, it is to be intended that if the proper demand had been made it would have been complied with. When the plaintiff demanded the possession of this property, the only doubt which could possibly be entertained was, whether he was entitled to it in his own right, or rather *jure mariti*, or as his wife's administrator; which doubt was practically no doubt at all, because in either case it was the defendant's duty to hand the property to him, subject only to the reductions which have been mentioned, and which he did not think proper to claim. The point of law was too clear to admit of doubt; and therefore, upon the authority of the cases referred to by the plaintiff, not qualified by those cited by the defendant on the argument, I think that the defendant ought to be charged with the costs of this suit.

Judgment. SPRAGGE, V. C.—In this case the bill is filed against the defendant, not so much as a trustee as against one who, having been a trustee and having received money in that character, now claims to retain it against the party entitled, and to apply it to his own purposes. It is said indeed on his behalf that it was his intention to apply it for the benefit of the child by the first marriage, but he has taken no steps to carry such intention into effect; and at all events, he was bound to ascertain whether he had any right to make such disposition of the money as to him might seem proper. If he had such right, he had a right certainly to apply it to his own uses, to the exclusion of every one else. His defence now upon the record is, that he is entitled to keep the money as his own. When the plaintiff, by his bill, claimed the money, and shewed himself entitled to it, the defendant resisted it at his peril. The words of Sir James Wigram in *Neesom v. Clarkson* (a), are applicable to this case. "I must,"

(a) 2 Hare, p. 705.

he said, "make the decree with costs; for when the claim was once asserted, the parties were bound at their peril to see if they had any ground for resisting it." I think this case is stronger against the defendant than any of those cited; for in none of them did the trustee set up a claim of right in himself to the property in question. To excuse a defendant from costs because he sets up against a legal right that his intentions were good, would afford a great encouragement to the resistance of the rights of parties in a court of equity, and thus induce mere experimental litigation. I agree with my brother Esten both as to the costs and interest.

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Wilson.

Judgment

PEMBERTON v. O'NEIL.

Creditor's suit.

An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage, settled certain land (the subject of the suit) in trust to the use of the wife for life, with power of sale to the trustee, to be exercised with the husband's consent. The legal estate was in one R., who had a primary charge on the premises. Under these circumstances, it was decreed that the plaintiff was entitled to redeem R.; that the wife's estate was exempt from every charge other than that of R.; that of this charge she must either keep down the interest or pay a proportionate share of the principal; that she was entitled to a provision out of her life estate; that subject to her interest, the property, on R. being paid, should be sold; and the enquiry was directed as to other judgments in order to a proper application of the proceeds.

This was a creditor's suit. The bill was filed by the Hon. George Pemberton, Henry Pemberton, William Pemberton and Joseph B. Provan, on behalf of themselves, &c., against Thomas M. Radenhurst, Thomas O'Neil and Catharine O'Neil his wife, and, as amended, stated that in the year 1843 O'Neil was indebted to the plaintiff in 1270*l.*, for which sum, together with costs, &c., they had obtained judgment; that an execution against goods having been duly sued out and proceeded on, was returned no goods, &c.; whereupon, and in August

Statement

1851. 1844, an execution against lands was sued out and placed in the hands of the sheriff of Bathurst, of which debt and writs, the bill alleged the defendant *Radenhurst* had notice; that at the time the proceedings at law were instituted, *O'Neil* was in possession, and was entitled to a grant from the crown for lot No. 8 in the 8th concession, and lot No. 8 in the 9th concession of the township of Horton; and that, after the writ against lands had been so placed in the hands of the sheriff, *Radenhurst* obtained an assignment of these lands from *O'Neil*, at which time *O'Neil* was indebted as well to the plaintiffs as to several other persons.

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O'Neil.

Statement. The bill charged this assignment to have been voluntary and fraudulent, and made in order to elude payment of debts, or else to secure *Radenhurst* a small sum of money, and was made to him as trustee for *O'Neil* and to screen the lands from the execution; that in January, 1845, the patent for these lands issued to *Radenhurst*, but that *O'Neil* had still continued in possession thereof.

The bill, after alleging several matters by way of pretence on the part of the defendants, which it is unnecessary to set forth, prayed that the assignment from *O'Neil* to *Radenhurst* might be declared void, and a re-conveyance to *O'Neil* ordered, so that the writ against lands might attach; or, if *Radenhurst* entitled to a prior charge, then for an account of the debt claimed; also an account of rents and profits, and a sale of a sufficient portion of the lands to pay the amount due to *Radenhurst*.

The material facts of the case, as they appeared from the respective answers of the defendants and evidence in the cause, were, that one *Robert McConachie*, deceased, was, and remained till the time of his death, in possession of the lands mentioned as

nominee of the crown, and by his will devised them in fee, and bequeathed all his personal property to his wife *Catharine* (who afterwards married *O'Neil*); that previously to her marriage with the defendant *O'Neil*, he promised and agreed to grant and release all interest which he might acquire in the lands by virtue of his marriage with her to his said intended wife. One of the witnesses swore that he had, as heir-at-law of *McConachie*, conveyed the lands to *O'Neil*.

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Pemberton
v.
O'Neil.

The defendant *Radenhurst* denied any notice of the claims of the plaintiffs; and stated that at the request of *O'Neil* he advanced a sum sufficient to pay the balance due on the lands to the government, and took the patent therefor in his own name, in order the better to secure himself; and that, at the time *O'Neil* assigned his interest to him (*Radenhurst*), he signed and delivered a writing to the defendant *Catharine*, whereby he undertook, after repayment of the amount which he should be obliged to advance to procure the patent, that he would hold the land as trustee for her; and that the sum paid, 110*l.* and upwards, together with interest, as also a sum of 53*l.* for money previously due by *O'Neil*, still remained due and unpaid.

Judgment.

It further appeared, that by a conveyance, intended to be a settlement, made in contemplation of such marriage, and made between *O'Neil* and one *Henry Phillips*, the said lands were conveyed to *Phillips*, in trust, to hold the same after the marriage to the use of *Catharine* during her life, and after her death to the use of *O'Neil* in fee; with a power of sale in the trustee by direction of *O'Neil* after her death, if he survived her.

The defendant *Radenhurst* submitted his rights as trustee to the judgment of the court.

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Pemberton
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O'Neil.

Argument.

The cause coming on for hearing, Mr. *Eccles* and Mr. *Strong*, for the plaintiffs, contended that the intended settlement was not in fact any settlement; it might be treated as articles for a settlement. *Radenhurst*, they contended, could not tack to the sum paid by him to government for the patent the amount due on the judgment against *O'Neil*.

They cited *Randall v. Morgan* (a) as to the effect of a settlement drawn up in accordance with a parol contract or agreement before marriage. If, however, the court should be of opinion that Mrs. *O'Neil* was entitled to a settlement, then a reference would be directed to enquire what ought to be settled on her. *Irvine v. Webster* (b) and *McLean v. Laidlaw* (c) were also cited.

Mr. *Vankoughnet* and Mr. *Turner* for the defendants.—If the court goes behind the patent at all, it will look at what was the real transaction between the parties. Here, *O'Neil* had not any right save that acquired through his wife, and the court would say that she had the best right to the property. They cited *Watts v. Bullas* (d), *Bale v. Newton* (e).

Judgment.

PER CURIAM. — This is a bill by a judgment-creditor for a satisfaction of his judgment out of the equitable estate of his debtor in certain lands, of which the debtor—namely the defendant *O'Neil*—procured a patent, by virtue, as appears, of a title vested in one *McConachie*, which devolved either upon his widow, whom *O'Neil* married, or to his heir-at-law, from whom *O'Neil* purchased all his interest with money received with his wife. The patent was in fact issued in the name of the defendant *Radenhurst*, but under an authority from *O'Neil*, and as a trustee, with a lien for money advanced for

(a) 12 Ves. 69. (b) 2 U. C. R. 224. (c) ib. 22. (d) 1 P. W. 60.
 (e) 1 Vern. 464.

procuring the patent. The legal estate is vested in *Radenhurst*. 1851.

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O'Neil.

Upon and in consideration of his marriage, *O'Neil* settled these lands in a manner somewhat peculiar, upon his wife for life, with remainder to himself in fee, with a power of sale in *Phillips*, a trustee, exercisable with the consent of *O'Neil*. Under this deed, it would appear that the legal estate would now have been vested in *Phillips*, had *O'Neil* then acquired it. Mrs. *O'Neil* says in her answer that it had been agreed to settle these lands to her separate use, and that she was advised the settlement which had been executed was inoperative for this purpose; but she does not actually repudiate it. *Radenhurst*, on obtaining the patent, signed a declaration of trust for the separate use of Mrs. *O'Neil*.

We think the derivation of the title through the wife, Judgment.
or with money received with her, the parol agreement to settle the property to her separate use, and the declaration of trust by *Radenhurst*, are all insufficient to divest the *prima facie* interest and title of the husband. This title and interest however, are, we think, bound by the settlement actually executed, and not repudiated by the wife. Whatever interest *O'Neil* had under this settlement the plaintiffs are entitled to attach for the satisfaction of their demand. *Radenhurst's* claim for the money advanced for procuring the patent constitutes the primary charge on the property. The plaintiffs are entitled to redeem *Radenhurst's* charge, and then to pray a sale of the whole estate, or of *O'Neil's* interest in it, according as the other defendants redeem or not; their judgment, however, must be confined to the proceeds of the husband's estate; and an enquiry is necessary as to other judgments, in order to a proper application of the monies realized by sale of the lands. The estate of the wife is exempt from every

1851. charge except the claim of *Radenhurst*, of which she must either keep down the interest or pay a proportionate share. She is entitled to a provision out of her life estate, for which purpose a reference to the master must be directed.

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v.
O'Neil.

Judgment.

As regards the redemption, costs will be as usual ; as regards the satisfaction of the judgment, the plaintiffs are entitled to their costs from *O'Neil*.

HOWCUTT V. REES.

Practice—Examination of party to the suit—Production of papers.

- A party to the suit having received notice of being examined by the opposite party, is not entitled to call for the production of papers in the possession of his adversary, in order the better to enable him to give his testimony.
- May 16. A party to the suit admitting the possession of documents relating to the matter in question in the cause, the opposite party is *prima facie* entitled to their production, and the party in whose custody they are must assign some ground for exempting them from the general rule.
- The defendant having obtained an order of course for the production of documents in the plaintiff's possession relating to the matters in question in the cause, the plaintiff, without producing any, lodged an affidavit stating that he had no such documents except the title deeds of the property in question in the suit, and certain letters addressed by the defendant to one K., who had purchased the property from the defendant, and who afterwards sold the same property to the plaintiff ; that the suit was for the specific performance of a parol agreement partly performed and not admitted by the defendant ; and that the letters did not relate to the matters in question otherwise than by affording evidence of the agreement and its part performance,—the affidavit filed in support of the motion merely said that the defendant was desirous of inspecting the letters in order to correct his intended testimony : *Held* that he was not entitled to their production.

Statement. The nature and circumstances of the motion are fully set forth in the judgment.

Argument. Mr. *Hector*, in moving for the order for the production of the papers in question, cited *Bate v. Bate* (a), where it was decided that, for the purpose of obtaining the inspection of certain documents alleged to be in the possession of the plaintiff, a cross bill was necessary ; the 31st order of May, 1850,

(a) 7 Beav. 528.

however, renders it unnecessary to pursue this circuitous and expensive mode of obtaining the information in this court. *Hamilton v. Street* (a) was also referred to.

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Howcutt
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Rees.

Mr. *McDonald*, *contra*, contended that the orders of May did not dispense with the necessity of a cross bill, unless where the defendant makes a case by his answer; and, he submitted, that even if a cross bill had been filed, and an answer had been put in denying the relevancy of the papers, in the same manner as the plaintiff has done in his affidavit, the court would not order him to produce them. The plaintiff swears that they support his case exclusively. He referred to *Boulton v. The Mayor of Liverpool* (b), *Princess of Wales v. Earl of Liverpool* (c), *Sheppard v. Morris* (d), *Taylor v. Henning* (e).

ESTEN, V. C.*—An application was made in this case by the defendant, under the 31st order of May 1850, to compel the production of all papers and documents in the custody or power of the plaintiff, relating to the matters in question in the cause. In answer to this application, which is one of course, the plaintiff, in conformity with the requirement of the order, lodged an affidavit to the effect that he had no papers or documents relating to the matters in question in the cause, save the title deeds of the lands which form the subject of the suit, and certain letters addressed by the defendant to the late Mr. *Kinnear*, who purchased the property in question from him, and under whom the plaintiff derives title to the same property. The affidavit further states that these letters relate exclusively to the title of the plaintiff, and that so far as they relate to the matters in question in the cause at all, they furnish evidence

Judgment.

(a) Ante vol. i, p. 327. (b) 3 Sim. 467. (c) 3 Swan 567. (d) 1 Beav. 175. (e) 4 Beav. 235.

* The Chancellor was concerned in the case while at the bar.

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Howett
v.
Rees.

Judgment.

of the agreement under which the plaintiff claims, and of the part performance of that agreement; the bill being for the specific performance of such agreement, which was by parol. The present application is for the production of these letters, and is supported by an affidavit of the defendant, to the effect that he desires an inspection of the documents in question for the purpose of correcting his intended testimony. The affidavit of the defendant does not help his case. It does not appear to me that a party about to undergo an examination, can call for the production of documents in the possession of his adversary, in order to enable him the better to give his testimony. Although, however, we cannot fail to perceive that this inspection is desired for the purpose of the the approaching examination, still, if the defendant is entitled to it for the general purpose of his defence, he may perhaps claim it, although when obtained he may avail himself of it in a way not contemplated by the order. I mean that I think it doubtful whether the court would be warranted in refusing the desired information, if the party seeking it were entitled to it in other respects, merely because it was sought on the eve of and with a view to an examination. The only grounds on which a party can require the production of documents in the possession of his adversary are, that such production is necessary to enable him to set up his defence, or that the documents in question evidence his title. The former ground is out of the question here, because the defence has been already set up; and the only question which we have to consider is, whether the documents of which the production is now sought, support and evidence the title of the defendant in such a manner as to entitle him to their production. The determination of a question of this nature must always depend in a great measure on the account given by the party in possession of the documents of their tenor and character. This used to be so upon

the answer under the former practice, and it arises from the nature of the case. The substituted practice now pursued will not, we think, be found less effectual for the purposes of justice than the one which it replaced. The party seeking the production of documents relating to the matters in question in the cause, is *prima facie* entitled to it. As to whether they do or not relate to such matters, the party having the custody of them cannot be mistaken; and admitting that they do so relate, he must withdraw them from the operation of the general rule. The reason assigned for this purpose will be critically examined, and therefore the party seeking the production obviously stands on the same vantage-ground that he formerly occupied. The question must be determined by the whole evidence which is before the court upon the particular point. I have already observed that the affidavit of the defendant himself in the present instance affords him no assistance whatever; and the determination of the question must turn altogether upon the affidavit of the plaintiff, which must, as in all cases of this nature, be closely examined both with regard to its fairness and sufficiency. The account which the plaintiff gives of the documents in question upon this occasion is, we think, a fair one. He says that they relate exclusively to his own title; that the suit is for the specific performance of a parol agreement partly performed, which is denied by the defendant; and that the letters in question, so far as they relate to the matters in question at all, are evidence of the agreement and its part performance—in other words, that they do not otherwise relate to the matters in question than by proving what the defendant has denied, and what the plaintiff is bound to prove. From this description two things are perfectly manifest—one, that the documents in question relate to the matters in question in the cause, and therefore that the defendant is *prima facie* entitled to the pro-

1851.

Howcutt
v.
Rees.

Judgment.

1851. duction of them; the other, that they evidence exclusively the title of the plaintiff, and cannot otherwise support the title of the defendant than by not proving the plaintiff's title. But a party is not entitled to the production of documents in his adversary's possession, and evidencing exclusively his adversary's title, merely because, when produced, they may fail to establish that title. The evidence upon which this question is to be decided at once raises the *prima facie* right of the defendant, and rebuts it; and therefore we think this motion must be refused, and with costs.

Howeutt
v.
Hess.

PEEL V. KINGSMILL.

Practice—Costs.

June 10 & 20. Where the plaintiff in a bill of discovery was out of the jurisdiction of the court, and the defendant, having answered, had obtained the usual order for payment of his costs, but with which order the plaintiff neglected to comply—in consequence of which the defendant was obliged to take out a subpoena and apply to the court for leave to serve the plaintiff therewith out of the jurisdiction; the court gave the defendant leave to serve the plaintiff out of the jurisdiction, and directed the plaintiff to pay the costs of the motion.

Statement.

The plaintiff in this cause filed a bill for discovery against the defendant, seeking discovery respecting certain transactions said to have taken place between the plaintiff and defendant. The defendant having answered the bill, moved the court for and obtained the usual order for payment of the costs of putting in his answer. This was granted; and the costs not having been paid, the defendant sued out a subpoena for the amount, but which he was unable to serve in consequence of the plaintiff's absence from the jurisdiction of this court, he being stationed with his regiment in Lower Canada. Under these circumstances, the defendant asked for leave to serve the solicitor of the plaintiff with the subpoena, or that he might be permitted to serve the

plaintiff therewith in Lower Canada; and that the plaintiff might be directed to pay the costs of this motion.

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 Peel
 v.
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Mr. Mowat, for the defendant, cited *Rider v. Argument*,
Kidler (a); *De Manneville v. De Manneville (b)*;
In re Lloyd (c); *Burlton v. Carpenter (d)*.

Mr. Strong contra, cited *Birket v. Holme (e)*;
Hawkins v. Hall (f).

THE CHANCELLOR. — We have considered the motion made by the defendant on a previous day, with respect to that portion of it which asks to charge the plaintiff with the costs of this motion: The bill was filed for discovery; and an answer having been put in by the defendant, the court made the usual order for payment of his costs; which, not having been complied with, the defendant now asks to effect service of the subpoena for those costs in Lower Canada. We thought the defendant clearly entitled to an order for service out of the jurisdiction; and as the plaintiff might have avoided all this difficulty by payment of the costs, as directed by the court, and has not thought proper to do so, we think the defendant also entitled to charge the plaintiff with the costs of the present application.

Judgment.

Motion granted, with costs.

(a) 12 Ves. 202. (b) 12 Ves. 203. (c) 10 Beav. 451. (d) 11 Beav. 33.
 (e) 4 Dowl. P. C. 556. (f) 1 Beav. 73.

1851.

Prentiss
v.
Brennan.Feb. 14, and
March 18.

PRENTISS V. BRENNAN, RE BRENNAN.

Practice—Sequestration.

Where a receiver of partnership property had been appointed, and certain chattels had been seized under a sequestration against the defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein—the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared) to enquire as to their interest, and any further order on the motion was reserved; the parties to the motion electing to have a reference instead of issues to try the questions in dispute.

Statement.

This was a motion by the plaintiff that the sequestrators might be ordered to deliver up or relinquish to the receiver in the cause the possession of all the household furniture, goods, chattels, and other effects in the possession of the said sequestrators, in order that the same might be sold and converted into money, with the approbation of the Master, and the proceeds paid into court to the credit of the cause, pursuant to the decree made therein, bearing date the 30th day of August last; or that such household furniture, &c., might be sold or converted into money in any other manner or for any other purpose; or that any other disposition might be made of the proceeds that the court should deem expedient; or that the said sequestrators might sell the said household furniture, &c.; and that all proper directions might be given in regard to such sale, and the disposition of the proceeds arising therefrom; or that the sequestrators might be at liberty to sell a sufficient part thereof to pay the expenses of and incidental to the sequestration.

The property was the same as was the subject of the motion reported *ante* volume 1, page 484. Before the order then made could be acted upon, the sequestrators to prevent, as was alleged, the removal of the property from the jurisdiction of the court, and which it was said the parties were preparing to accomplish, had seized the property under the writ; and it was

in their hands when notice of the present motion was given. 1851.

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Statement.

Upon the present application, Mrs. *Brennan* and Miss *Brennan*, the mother and sister of the defendant, claimed each a small part of the property in question as their own, and the remainder was claimed by Mrs. *Brennan* under a lease of the same and of the defendant's dwelling-house, executed in her favour by the defendant for ten years from the 1st day of April, 1850, at 50*l.* a-year. It did not appear when this lease was executed. By an agreement executed at the same time, the rent was to be applied in payment of a debt of 370*l.*, which was alleged to be due from the defendant to his mother on some old transactions.

Three affidavits were filed in support of the claims so set up—one by each of the two claimants, and a third by the defendant's brother, *David Brannen*. Affidavits were also filed against the statements contained in the affidavits so filed on behalf of the claimants.

Mr. *Mowat*, for the plaintiff.—If not entitled to all that is asked for, it is clear upon the cases that a sufficient quantity of the goods can be sold to pay the expenses attending the execution of the writ. Argument.

He contended that the lease was a mere fraudulent attempt to place the property out of the reach of process. Everything owned by the defendant is assigned; still no change of possession ever took place, and the rent reserved bears no proportion to the value of the property alleged to have been leased.

Mr. *Turner*, contra, submitted that a sequestration and receiver could not co-exist, and objected to the sale of the property or any portion of it.

1851. The cases cited are referred to in the judgment.

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THE CHANCELLOR.—The substantial object of this motion is the sale of certain chattels in the hands of the sequestrators. Cases of this sort are of rare occurrence. The practice in relation to the proceeding remains in some respects undefined (*a*), and if undefined in the courts where the practice has grown up, and where the records are at hand, the difficulty of determining doubtful points satisfactorily here must be apparent. Whether a mere chose in action can be sequestered, when the right is questioned (*b*)—whether the court will permit sequestrators to seize tangible property in the hands of third parties claiming title (*c*)—whether the court will order a sale of property in the hands of sequestrators upon mesne process, except, perhaps, for the purpose of paying the expense of the sequestration (*d*)—are questions, all of which would seem still open to more or less doubt. I may observe, however, in passing, that two points raised upon the argument of this motion would seem to have been settled by recent decision. It is not necessary, according to modern practice, to file a return to the writ of sequestration; and a sale to pay the expense of the sequestration, under existing circumstances at all events, would seem to be irregular (*e*). It appears to me, however, that none of these questions properly arise at the present moment. Here the sequestrators have already seized certain chattels, in the hands of third parties, who asserted title. Now, reason and authority demonstrate that it must be competent to a party complaining of an unauthorized seizure by sequestrators, to

(*a*) *Emprengham v. Short*, 3 Hare, 470; *Francklyn v. Calhoun*, 3 Swan, 310; *Bird v. Littlehales*, 3 Swan, 299, n. (*b*) *Johnstone v. Chippendall*, 2 Sim. 55. (*c*) *Francklyn v. Calhoun*. (*d*) *Knight v. Young*, 2 V. & B. 184; *Hales v. Shaftoe*, 3 B. C. C. 72—but see *Maynard v. Pomfret*, 3 Atk. 468, 4 Ves. 471; *Shaw v. Wright*, 3 Ves. 22. (*e*) *Goldsmith v. Goldsmith*, 5 Hare, 123.

come in and be examined *pro interesse suo*: indeed such would seem to be the only remedy for an illegal seizure by such officers (a). And where the party so examined establishes his title to the satisfaction of the court, the course would seem to be, immediate restitution and an enquiry as to damages (b). It is true that the present claimants did not come here for an order to be examined *pro interesse suo*; but it cannot follow that they have thereby forfeited their right to this property. The plaintiff has thought proper to serve them with notice of the present motion; and, in shewing cause against it, they have now asserted, very positively at least, their title. The affidavits are, no doubt, open to comment; but they are unquestionably quite sufficient to warrant enquiry, if the parties desire it; and clearly it is competent to the court to make such an order upon the present motion (c).

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I am of opinion that, under all the circumstances of the present case, the question ought to be referred to a jury; but before that course can be satisfactorily adopted, these parties must furnish a list of the articles claimed (d), in order that the subject matter of dispute may be distinctly known, and that the plaintiff may have an opportunity of considering to what extent he will resist the demand.

Judgment.

If the parties think that a reference to the Master would better determine their various rights, reasons in favour of that course are not wanting, and, if desired, we should feel disposed so to direct. The costs must be reserved.

ESTEN, V. C.—The goods which form the subject of the present application, have been determined, as

(a) *Angel v. Smith*, 9 Ves. 335; *Rock v. Cook*, 2 Phil. 691. (b) *Copeland v. Mape*, 2 B. & B. 66; *Arrowsmith v. Hill*, 2 Phil. 609. (c) *Bird v. Littlehales*, 3 L. Man. 299. (d) *Lord Pelham v. Duchess of Newcastle*, 2 Swan. 290.

1851. between the plaintiff and defendant in this cause, to be the property of the partnership—not indeed for the purpose of final disposition, but for the purpose of being placed *in medio* until the matters in dispute shall be ultimately settled. The affidavits exhibited on this occasion do not impugn this determination. As between these parties therefore, and for this purpose the property in question must be deemed to be joint property. It appears, then, that the plaintiff having obtained a sequestration against the individual property of the defendant, and also a receiver of the joint effects, the sequestrators have seized the joint instead of the separate property. This must be deemed to be a mistake; or if the real facts are, as they are suggested to be, that the property in question was seized as separate property in order to preserve it as joint property against an attempt to place it beyond the reach of the court, the result is the same.

Judgment.

In either case it appears to me that it would have been a matter of course, at the request of the plaintiff, to have ordered its delivery to the receiver, not indeed for the purpose of sale, which appears to me out of the question in the present state of the cause, but in order that it may remain in the custody of the court until it is finally decided to whom it belongs. For this purpose it seemed to me during the argument, and it seems to me still, that it would have been unnecessary that the other parties should have had notice of this application. Having had such notice, however, they have appeared and preferred a claim of property. It would be competent, I think, to the court to grant this application to the extent of ordering the delivery of this property to the receiver without costs as to the defendant, and with costs to the other parties; but this would be without prejudice to any application that these parties might be advised to make, to be examined *pro interesse suo*; and in order to avoid this circuitry, it may be very desirable and proper to put the matter now in a

course of enquiry. For this purpose, however, I think that Mrs. *Brennan* and Miss *Brennan* should specify the articles which they claim, and, as they appear to be without the jurisdiction, that they should furnish security for the costs of the proposed investigation, whether it should be effected by means of an issue or otherwise.

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SPRAGGE, V. C.—I think that the plaintiff is asking, upon this application, for that which he could ask for properly only upon further directions, in the event of the property in question being found by the Master's report or otherwise proved to be partnership property. The notice of motion, in each of its alternatives except the last, asks the court to deal with the property, and to dispose of it in such a way as it could only do if regularly found to be partnership property. The court is not merely asked to provide for the safe keeping of property in danger of being lost to the plaintiff unless the court interposed and placed it in charge of its officers. This was the case on a former application, when the goods in question were ordered into the possession of the receiver, a strong probability being shewn to the court that they were about to be removed beyond its jurisdiction, and that they were partnership property. Upon that occasion the court acted, upon being satisfied as to necessary facts for its interposition, by the affidavits of the plaintiff and others; but it is quite a different thing when the court is applied to, not for the temporary safe keeping of property, but to deal with and dispose of it as the property of a person or persons other than those in whose possession it is found, and when those in whose possession it is found lay claim to it as theirs. It must be proved by regular evidence to be partnership property, before the court will make any final disposition of it as such. The right of property, and the conflicting interests of the different claimants to the goods in question—some of

Judgment.

1851. them not even parties to this suit—cannot be tried by affidavit.

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Judgment.

There is something peculiar, too, in the position of the plaintiff. The goods in question are in the hands of sequestrators, seized while in the hands of *Elizabeth* and *Eliza Brennan*, under a writ of sequestration against the personal estate and rents and profits of the real estate of the defendant, issued by the plaintiff. He now asks that they be transferred to the receiver of the partnership effects, in order to their being sold. Thus, having seized goods as the property of the defendant, he asks that they be transferred and sold as the property of the partnership, and that without establishing by legal evidence that they were the property either of the defendant or of the partnership. They are in the hands of sequestrators, too, only for the contempt of the defendant in not bringing in books and papers, and not in execution of a decree. The last alternative of the application is, that the sequestrators be authorized to sell a sufficient part of the goods to pay the expenses of the sequestration. The application is substantially for another purpose. The goods are not perishable; no sufficient reason or necessity is shewn for their sale; and it is not yet regularly determined that they are not the goods of third persons.

I think the questions of property should be investigated in one of the modes suggested by his lordship the Chancellor. I would interpose no unnecessary difficulty in the way of the plaintiff's receiving whatever he may be justly entitled to, and which, I apprehend, will be but a wreck of what he entrusted to the defendant, whose dishonest conduct has met with the just reprobation of this court. But while protecting the plaintiff as far as possible from the consequences of frauds practised upon him, his proceedings must not be facilitated at the expense of the settled rules of the court. The rights of the parties can be only decided by legal evidence.

KILLALY V. GRAHAM.

1851.

Practice—Setting down cause—Proof of exhibits by affidavit.

Where a plaintiff filed a replication to the defendant's answer, and afterwards, and without serving a rule to produce witnesses, set the cause down for hearing, and declined to treat it as set down on bill and answer; the court (Esten, V. C., dissentiente) ordered the cause to be struck out of the paper for irregularity; but, inasmuch as the defendant had not taken any step to correct the irregularity before the hearing without costs.

In future, when any objection exists to the setting down of a cause, or to the subpoena to hear judgment, the opposite party will be held, at the hearing, to have waived it, unless it be shown that the objection could not, with reasonable diligence, have been taken before the hearing. When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit.

The bill in this cause was filed by the assignee of ^{Statement.} a mortgage security against the mortgagor, praying a foreclosure.

The defendant put in his answer, admitting the execution of the mortgage, but stating his ignorance of the fact of the assignment of the mortgagee to the plaintiff.

To this answer the plaintiff filed a replication in the usual form; and some time afterwards, without issuing a rule to produce, and without withdrawing his replication, set the cause down for hearing, and produced at the hearing an affidavit proving the execution of the assignment of the mortgage to himself.

Mr. Read, for the plaintiff, asked for the usual ^{Argument.} decree of foreclosure.

Mr. Mowat, for the defendant, objected that the cause had been set down without service of the rule to produce witnesses, and without publication being passed; while at the same time there was a replication remaining on the files of the court putting in issue all the statements contained in the answer. He also objected to the plaintiff being permitted to prove an exhibit by affidavit, if the cause were to be treated as set down on bill and answer.

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Mr. *Read*, in reply, contended that the rules to produce witnesses and pass publication were unnecessary and inapplicable, because he did not require to offer any evidence, and could prove by affidavit the only exhibit which the defendant had not admitted.

The cases cited are all mentioned in the judgment of the court.

March 18.

Judgment.

THE CHANCELLOR.—Where a cause has been set down prematurely, the most convenient practice, in my opinion, would be to hold the party served with the subpoena to hear judgment bound to move for its discharge, where there is sufficient time for that purpose, and in default to treat him as having waived the irregularity. That course is clearly sanctioned by the practice (*a*); and when the expense of preparing for the hearing is considered, it is obviously convenient that the question of irregularity should be disposed of upon motion, instead of being taken as a preliminary objection at the hearing (*b*). On the other hand, such a practice would not be productive of unnecessary expense, because it would always be in the power of the party whose proceedings are impugned to avert the costs upon the motion, by waiving the steps objected to as irregular and paying the costs then incurred. The observation applies with increased force to proceedings under the orders of May, 1850, by which the rules to produce witnesses and pass publication are dispensed with. Setting down a cause prematurely, under those orders, would be plainly, in my opinion, a mere irregularity, in dealing with which it would be proper to apply a principle of vital importance in the administration of justice—namely, that objections on the ground of irregularity should be considered to have been waived when

(*a*) *Ellis v. King*, 4 Mad. 126; *Lord v. Genslin*, 5 Mad. 83.

(*b*) *Ketchum v. McDonnell*, 2 U. C. Rep. 378.

the party objecting fails to come promptly for their correction. In *Davis v. Franklin* (a), Lord Langdale observed, "If the plaintiff was aware of the objection, he ought to have stated it, and if necessary to have applied at the first opportunity to take the second certificate off of the file; and even if he was not aware of it, I think that it would not be just to permit him to take advantage of a common error, in which he himself participated, to deprive the other party of his right to the result of that investigation before the Master which was carried on without objection from him on this ground. The limitation of time in the 12th order was meant for the benefit of the defendants, and with their consent, and, if not by the Master, may, by the authority of the court, without their consent, be enlarged so long as justice may require it; and if the defendant, by acquiescence or omission to object, permits the other party and the Master to proceed as if he did acquiesce, I think that he comes too late if he does not come at the first opportunity to complain of the irregularity." And in a very recent case (b), the late Lord Chancellor remarked, "However important it may be that the general rules of practice should be strictly enforced, nothing can be more injurious to the suitor or more destructive of justice, than to allow a party having an objection of this sort, not touching the substance of the case, but merely an objection of form, to keep it to himself, and to permit the other party to incur the expense of a long course of consequential proceedings, and then to come and say, you have been wrong from the beginning, and all the proceedings are to go for nothing" (c). I have cited the observations of those able and experienced judges, not merely for the purpose of evincing their sense of the importance of the principle, and expressing my

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(a) 2 Beav. 375. (b) *Steele v. Plomer*, 2 Phil. 783. (c) See also *Const v. Barr*, 2 Russ. 161.

1851. own concurrence, but rather because I think the principle has been too much lost sight of heretofore in this court, and because the language seems to me peculiarly applicable to the case immediately under consideration.

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Judgment.

But, assuming the cause to have been irregularly set down, the practice heretofore existing would not, we think, warrant us in holding that the defendant has, by neglecting to move, waived the objection (*a*). The question therefore, is, have the proceedings been irregular? In my opinion they have been clearly so. It was open to the plaintiff either to have set down his cause upon bill and answer, thus admitting the truth of the answer and precluding the necessity of proof, or to have brought it to a hearing after the usual time for the production of evidence. He has done neither. Having filed his replication, and thereby denied the truth of the answer, and put the cause at issue, he has set it down to be heard without affording the defendant an opportunity of adducing proof. Had it been the plaintiff's object to have heard his cause upon bill and answer, then, to have so set it down, with a replication upon the file, would have been irregular. But such an intendment could not be, as I think, properly made, because it is directly negatived by the replication; and, however such an inference might conduce to the plaintiff's interest in the present case, it would be frequently productive of ruinous consequences. There is, at all events, no room for the argument here, because the learned counsel for the plaintiff did not bring on his case upon bill and answer, but relied upon his right to omit the rules to produce and pass publication.

Had the case been properly set down upon bill and answer, the better opinion would seem to be that

(*a*) *Powell v. Martin*, 1 Jacob & W. 292.

the plaintiff might have proved his exhibits at the hearing; for although the Vice-Chancellor of England, in *Jones v. Griffiths* (a), refused to adopt the practice pursued in *Rowland v. Sturgis* (b), yet in a very recent case, when the Vice-Chancellor's judgment was cited, Sir *James Wigram* admitted the evidence (c).

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I am of opinion, therefore, that the subpoena must be discharged and the cause struck out of the paper.

ESTEN, V. C., intimated that his opinion was against that of the other members of the court; that the cause having been set down after replication, but without service of the rule to produce witnesses, the cause was virtually brought to a hearing upon bill and answer; and that the defendant was entitled to read his answer, consequently that the cause could be heard; but that had the plaintiff served the rule to produce witnesses, his Honor would have inclined to the opinion that then the plaintiff was bound to proceed in the usual way by passing publication.

Judgment.

SPRAGGE, V. C.—By filing the replication, the cause was put at issue by the plaintiff. He thereby traversed the defence made by the answer, and put the defendant to the proof of it. He has taken out no rule to produce witnesses or to pass publication, and now comes to a hearing claiming the right (though he does not need to exercise it) of reading from the answer such passages as he may select in proof of his own case; insisting that he was not bound to take out rules to produce and pass, because he did not find it necessary to support his case by the evidence of witnesses—insisting, in effect, that though he had traversed the defendant's answer, he was not bound to give him an opportunity to prove

(a) 14 Sim. 262. (b) 2 Hare, 520. (c) Chalk v. Raine, 13 Jur. 981.

1851. it, because for his own case he required no proof but
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It is obvious that such a position is untenable; the authorities cited for it certainly do not support it.

Judgment.

A question arises, however, whether, the rules to produce and pass not having been taken out, the omission has not the effect of withdrawing the replication and setting down the case upon bill and answer, the answer thus standing admitted. The plaintiff's counsel disavows this position, and the cause is in fact not set down upon bill and answer, but is brought to a hearing as an ordinary issue. The defendant, on his part, insists that the cause is not regularly brought to a hearing, with replication on the files and no rules taken out. By *Wyatt's Practical Register*, and the case of *Grosvenor v. Cartwright* (a), it would appear to have been held that, "If the plaintiff reply to one answer, and without rejoining and giving rules for publication, bring the cause to a hearing, the answer shall be taken as wholly true as if there had been no replication;" and the reason given is, that the opportunity which the defendant hath to prove his answer is taken from him. The reason given would apply certainly whether a subpoena to rejoin had issued or not; but without a subpoena to rejoin, the cause was not, according to the then practice, at issue, and the court might hold the defendant's answer to be wholly true, where the plaintiff had not fully put it at issue, and yet not hold it to be so where it was fully put at issue. No modern case is cited in support of what was held in *Grosvenor v. Cartwright*, nor does any modern book of practice speak of what was held in that case as the practice of the court. By the present practice, a replication being on the files, the

(a) 2 Ch. Cas. 21.

defendant's answer is formally denied by a pleading of the plaintiff. Can the court give to the omission of the plaintiff to take out rules to produce and pass, the effect of taking that pleading off the files? I think such an omission is an irregularity, if not a defect in the plaintiff's proceedings, but that the replication remains, and that the answer is still in issue.

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It is said in *Maddock's Practice* (a), that the court would not give leave to withdraw a replication, unless for the purpose of amending the bill; and *Pott v. Reynolds* (b), and the more recent case of *Cowdell v. Tutlock* (c), shew that the plaintiff cannot withdraw his replication but by order of the court, and upon payment of certain liquidated costs; and this appears to be the case since the court has given full costs on the dismissal of the plaintiff's bill, as well as before. From this I infer that the plaintiff could not himself take any course which would have the effect of withdrawing his replication and setting down his cause upon bill and answer; because if such a course had been open to him, he would have adopted it instead of applying to the court and paying costs to accomplish that which he could accomplish as well without.

Judgment.

It was objected by the plaintiff, upon the point being first raised by the court, that even if the plaintiff's proceedings have been irregular, the defendant has waived the irregularity by not taking the objection before the hearing. The court certainly does require that a party complaining of an irregularity shall take his objection on the first proper occasion, and the rule is undoubtedly a most salutary one; but in the cases where the court has held a party to be too late, there has been actual acquiescence or a fit

(a) Vol. 2, p. 452. (b) 3 Atk. 565. (c) 3 Ves. & B. 19.

1851. occasion for taking the objection improperly allowed to pass. The subpoena to hear judgment need not be served more than eight days before the hearing; and though a defendant may move against it, I do not think he is bound to do so. If a cause is set down irregularly, the objection may, it seems, be taken even after decree (a); and an irregularity in the subpoena to hear judgment, or in the service of it, may be taken advantage of at the hearing (b). I doubt, too, whether the omission to take out the rules for publication was not more than an irregularity—whether it was not a defect which made the proceedings erroneous, and in relation to which *waiver* is not held to apply so strictly as in cases of mere irregularity. I think, therefore, that the objection was taken in time, and must prevail.

Judgment

At the same time I agree perfectly in the propriety of its being required in practice that any objection to the subpoena to hear judgment, or to the setting down of a cause, or to any antecedent proceeding as irregular or defective, should be taken by motion, promptly, before the hearing, unless it be shewn to the court that it could not with reasonable diligence be taken before the hearing.

(a) Danl. Prac. 1170. (b) Carrick v. Young, Jac. 524.

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McMURRAY V. BURNHAM.

Assignee of Mortgage—Tacking.

Where there were three mortgages on the same property, and the third was taken without notice of the second, and was afterwards transferred to another person, who thereupon obtained a conveyance to himself of the first mortgage: *Held*, that he could not tack his third mortgage to the first; and the court refused a reference to enquire whether the assignee had or had not notice of the second when he took the conveyance of the third mortgage.

Sept. 17,
Nov. 1 &
Dec. 10, 1850
and
Feb. 11, 1851.

Statement.

This was a foreclosure suit. A decree had been made in it by his Honor Vice-Chancellor *Jameson*, and the cause now came on to be re-heard on the petition of the plaintiff.

Argument.

Mr. *Mowat* for the plaintiff.

Mr. *Grant* for the defendant *Beekman*.

Mr. *Macara* for the defendant *McKnight*.

The defendant *Saxon* has disclaimed.

The following cases were cited:—*Bennett v. Walker* (a), *Harrison v. Forth* (b), *Lowther v. Carlton* (c), *Willoughby v. Willoughby* (d), *Higgon v. Syddal* (e), *Chalmers v. Lanion* (f).

Judgment.

THE CHANCELLOR.—In this case there were three mortgages. The third mortgagee, having foreclosed the equity of redemption of the mortgagor, executed a mortgage to an American mercantile firm, who transferred their security to the plaintiff. The plaintiff subsequently obtained an assignment of the first mortgage, and now seeks to exclude the second mortgagee by adding the third mortgage to the first, and thereby obtaining for it priority. The ground on which he rests this claim is, that the persons to whom the third mortgage was made, and who transferred it to him, had no notice of the second mortgage when they advanced their money; and as they could undoubtedly have gotten in the first mortgage

(a) West Ch. R. 131. (b) Prec. Ch. 51. (c) 2 Atk. 242, S. C. Barnard, 358; S. C. 2 Eq. Ca. Ab. 685, pl. 10. (d) 1 T. R. 767. (e) 1 Ca. Ch. 149. (f) 1 Camp. 387.

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and tacked their own to it, and thereby excluded the second mortgagee, he, as standing in their place, contends that he should, now, be permitted to do the same. This we understand to be the only point to be decided on the present occasion. The plaintiff is obliged to rest his case upon the want of notice in the persons under whom he claims; for he alleges no want of notice in himself; and as that fact is an essential ingredient in his title, it must be assumed against him. We are of opinion that his claim to priority over the second mortgagee cannot be supported. No authority has been cited which will warrant it; and it would be carrying the doctrine of tacking a step further than it has yet been carried. The reasonableness of it, too, is very questionable.

Judgment.

The principle to which it is referred is, that a party having purchased without notice, should be at liberty to alienate to one who has notice, so as to substitute him in all respects in his place, as he would otherwise be prevented from enjoying the full benefit of his purchase. The principle is undeniable, but does it apply to a case like the present? The third mortgagees are at liberty to transfer their whole estate to the plaintiff in the same plight in which they have it themselves; but the privilege contended for is no part of their estate. It is conceded to persons who have advanced their money in ignorance of an intermediate incumbrance, in order to enable them to extricate themselves from a difficulty into which they have unwittingly fallen. Should they exercise their privilege they acquire priority, and can transfer that priority actually acquired to a purchaser. But if they do not choose to exercise their privilege and thereby better their estate, they can transfer their estate, but no more than their estate, to a person who has thrust himself into the difficulty with his eyes open. In all the

cases which have been cited as analogous, the interest transferred had been actually acquired before the transfer, and was only not impaired by reason of notice in the party to whom the transfer was made. The doctrine of tacking, which is contrary to the natural order of things, was introduced for the protection of parties who had acted *bona fide*, and the privilege which it confers is not to be made the subject of speculation. We do not, at all events, feel warranted in extending the doctrine beyond the adjudged cases, and therefore must decide against the claim in the present instance.

1851.

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v.
Burnham.

Judgment.

Mr. *Mowat* then asked for a reference on the point of notice on the part of the plaintiff, alleging that, although not stated in the bill, still that the fact was that *McMurray* had obtained the conveyance of the third mortgage without any notice of the intermediate incumbrance. The court directed the point to be spoken to by counsel, and on this day Mr. *Mowat* cited *Adams v. Brooke* (a), *Heaphy v. Hill* (b), and *Story's Pleadings*, sec. 902.

Dec. 10.

Argument.

Mr. *Turner*, contra.

THE CHANCELLOR. — Three successive mortgages had been executed affecting the premises in question in this cause. The plaintiff, who is the assignee of the first and third of these securities, asserted by his bill a right to tack, thereby acquiring for the last mortgage priority over the mesne incumbrance. Upon the hearing, however, we were of opinion that the equity advanced by the plaintiff depended upon his having advanced his money in the purchase of the latter security without having had notice of the mesne incumbrance; and as that fact had not been alleged by the bill, we decided that he had failed to establish his case.

Feb. 11:

Judgment.

(a) 1 Y. & C. C. C. 627. (b) 2 S. & S. 29.

1851. The learned counsel for the plaintiff represents himself as having been guided by legal conclusions different from those drawn by the court; he alleges that his client did in fact advance his money in the purchase of the last mortgage without notice of the mesne incumbrance; and he asks an inquiry. Undoubtedly the arguments advanced by Mr. *Mowat* had great weight, and we were unable to find any direct authority upon the subject. But our judgment was not hastily adopted. If erroneous it must be corrected elsewhere. Till corrected we must assume it to be the law. And the question is, whether, assuming it to be the law, we should be warranted in granting the inquiry now asked.

Judgment

Taking it for granted that it is competent to the court to direct such an enquiry under existing circumstances (upon which point we find it unnecessary to express any opinion), it must be obvious that such an order could be justified only when affording a means of escape from manifest injustice. But here, on the contrary, this extraordinary interposition is asked for the purpose of enabling the plaintiff to avail himself of an equity, pronounced by able judges to have no foundation in justice, and altogether abolished by a recent act of the legislature as productive of positive injustice. Had the plaintiff established his case in the ordinary way, he would, beyond question, have been entitled to the benefit of the law, whatever might have been our opinion as to its abstract propriety. But to order enquiries now, which would have the effect of disturbing the natural order of priority amongst the different incumbrancers would, as it seems to us, be a most unwise exercise of discretion (a).

(a) *Marten v. Whichelo*, C. & P. 261.

1851.

GORDON V. LOTHIAN.

Mortgage—Tacking.

A mortgagor conveyed his equity of redemption to a third party, and afterwards contracted to *release* to the mortgagee; and the latter having no notice of the prior conveyance, paid the mortgagor some part of the consideration he had contracted to give for the release: *Held*, that he was entitled to tack what he had so paid to his mortgage debt.

Nov. 29, 1850
and
Mar. 31,

This was a hearing of the cause. The defendant *Lothian*, after selling his equity of redemption in the property in question to the defendant *McDearmid*, contracted to release to the plaintiff. The principal question between the parties was, which of the contracts was first entered into, and this was ultimately decided in favor of *McDearmid*. A question then arose as to whether the plaintiff, who held a mortgage on the property before either contract, was entitled to tack to his mortgage debt, the payments made by him under his contract for the purchase of the equity of redemption, he having made such payments without any notice of the sale thereof to *McDearmid*.

Statement.

Mr. *Strong*, for the plaintiff, referred to *Commercial Bank v. Street* (a), and the case there cited, as entitling the plaintiff to retain his mortgage security on the premises until all subsequent advances made by him *bona fide* and without notice were paid. Mr. *Story*, in combatting the position laid down by Sir *Edward Sugden*, that no lien is created by payment of the purchase money, states that a *bona fide* purchaser without notice, paying part of his purchase money and then receiving notice, has a lien for the advances made by him before notice. He also cited *Burgess v. Wheate* (b), *Lacon v. Mertins* (c), *Mackreth v. Symmons* (d), *Ludlow v. Grayall* (e),

Argument

(a) Ante v. 1. p. 169. (b) 1 W. B. 150. (c) 3 Atk. 1. (d) 15 Ves. 353. (e) 11 Price 58.

1851. Nor does it affect the rights of the parties that the plaintiff here is seeking to enforce by means of his legal estate an equitable right, although the rule was formerly taken to be, that a defendant might make

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Argument.

use of his legal estate to defend his equitable interest, but could not do so to assail the rights of others; referring to *Spence* on the Eq. Jur. of the court of Ch. 768, 434-6; *Sober v. Kemp* (a); *Hanson v. Keating* (b).

Mr. Mowat for the defendant *McDearmid*: The rule is everywhere laid down in the English authorities and text books, that a purchaser for valuable consideration without notice cannot avail himself of the privileges of that character unless he has actually paid all his purchase-money without notice. On the other hand, it has never been suggested in England that he has a lien for so much as he had paid before notice, where notice was received before payment of all; and the cases for such a claim must frequently have occurred there, if it were not well understood that there was no foundation for it. The doctrine of tacking is an objectionable doctrine, and not to be extended. He referred to *Caton v. Lord Bolingbroke* (c) *McCrombie v. Davis* (d), *Molesworth v. Robins* (e), *Potter v. Sonderson* (f).

Mr. R. Cooper, for the defendant *Lothian*, took the like objections as had been taken on behalf of *McDearmid*.

Judgment.

Mar. 21, 1851

THE CHANCELLOR.—In this case, *Gordon* being seized in fee simple of the premises in question, by way of mortgage, contracted with the mortgagor for the purchase of the equity of redemption, and is said to have paid a portion of his purchase money without notice of any prior contract. At the time of this agreement the mortgagor had in fact sold the equity of re-

(a) 6 Hare, 155. (b) 4 Hare, 1. (c) 1 B. C. C. 301, S. C.; 2 B. C. C. 282. (d) 7 East 5. (e) 2 J. & L. 358. (f) 6 Hare, 1.

demption to *McDearmid*, and *Gordon* was apprized of that circumstance before his purchase money had been paid in full. The only remaining question in the cause is, whether *Gordon* be entitled to tack the portion of purchase money paid before notice to his mortgage debt.

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v.
Lothian.

A plea of purchase for valuable consideration without notice, must deny notice previous to the execution of the conveyance and payment of the consideration (*a*). Sir *Edward Sugden* (*b*), in his treatise on the law of vendors and purchasers, states the rule thus: "Notice before actual payment of all money, although it be secured, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract." And the cases cited fully sustain the proposition. In *More v. Mayhew* (*c*) it was decided that "If after execution of a conveyance, but before payment of the consideration money, the purchaser has notice that the vendor has no title to the lands, that is sufficient to avoid the purchase." And in *Jones v. Stanley* (*d*), the court determined a plea of purchase for valuable consideration without notice, which denied notice at the time of the purchase to be bad, "inasmuch as it might be he had no notice then (the time of the purchase), and might have notice after, before or at the sealing of the conveyance; and if there was any notice before the conveyance executed, that should charge the defendant."

Judgment.

A strict application of the rule laid down in the above cases would, perhaps, exclude the present plaintiff's demand. But a mortgagee, dealing for the equity of redemption, is not in the position of an ordinary purchaser. His peculiar position secures

(a) Mitford, 320 (5th ed.)
page 1069. (c) 1 Cha. Ca. 34.

(b) Page 1036 (11th ed.); see also
(d) 2 Eq. Ca. Ab. 685, pl. 9.

1851. for him peculiar advantages. And although no case
 Gordon has been cited precisely in point, yet some of them
 v. are, in my opinion, sufficient in principle for the
 Lothian, decision of the present case.

It is well settled that a mortgagee holding the legal estate, who makes further advances on the security of the land without notice of a subsequent mortgage, is entitled to tack such advances to his mortgage debt. "The constant rule of equity, observes Sir *Edward Sugden* (a), is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first instance." And the same learned author proceeds to say, "It is conceived that the rule would apply to a mortgagee lending a further sum of money to the mortgagor without notice of the sale of the equity of redemption." For this latter proposition
 Judgment. no authority is cited, and we have not been able to discover any; but it is, I think, well founded in reason. A mortgage is a sale *pro tanto*. If subsequent advances may be tacked, to the prejudice of such a qualified transfer, I am unable to discover any principle on which we could deny the right upon a sale of the entire equitable interest.

But not only may a first mortgagor tack such subsequent advances, when made expressly on the security of the land, but such advances, when made on the security of a judgment merely, may also be tacked to the mortgage debt (b). Lord *Eldon*, in course of his judgment in *ex parte Knott* (c), observes, "But if there is once a creditor by mortgage, and he afterwards advances money upon a judgment, the court will intend that he makes that advance meaning to take security upon the land for both, and he

(a) Sug. V. & P. 983 (11th ed.) (b) *Brace v. Duchess of Marlborough*, 2 P. W. 491. (c) 11 Ves. 617; see also *Baker v. Harris*, 16 Ves. 400.

may tack. If, then, a mortgagee making further advances upon judgment without notice, is to be intended to have made such advances upon the security of the land, and to have, therefore, acquired a right to tack against a prior sale of the equity of redemption, I know of no principle on which we could refuse to make the same intendment in favor of a mortgagee, who, having the legal estate already vested in him for the security of his debt, has made further advances without notice upon a contract for the purchase of the equity of redemption—a contract entered into for the express purpose of converting that legal estate which is his upon condition, into an absolute indefeasible interest. The argument is, in my opinion, *a multo fortiori* in his favor.

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I have come to the conclusion therefore, though with hesitation, that the plaintiff is entitled to an enquiry whether any and what sums had been paid by him to the defendant *Lothian* upon the contract set out in the pleadings, before he had notice of the sale to *McDearmid*, and that he is entitled to tack any sum so paid to his mortgage debt (*a*).

Judgment.

ESTEN, V. C.—This is an application to add to the mortgage debt the part of the purchase money paid by the plaintiff for the purchase of the equity of redemption of the property in question. The case is, that a mortgagee, after the sale of the equity of redemption to a third person, contracts for the purchase of it himself, and pays part of his purchase money before he has notice of the previous sale. The prior purchaser has paid the whole or the greater part of his purchase money, and received a conveyance. It is clear that, but for the circumstance of the mortgage, the plaintiff would have no ground for the claim which he prefers. On a bill by the

(*a*) *Du Vigier v. Lee*, 2 Hare, 334; *Hanson v. Kaiting*, 4 Hare, 1.

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prior purchaser against him and the vendor for a specific performance of the prior agreement, the subsequent purchaser could not have pleaded a purchase for valuable consideration without notice, because having received notice before he had paid the whole of his purchase money, he would have been decreed to have conveyed to the prior purchaser, and been left to his remedy against his vendor (a). The question then is, whether the circumstance of the mortgage makes any difference on the principle that a mortgagee after, but without notice of, a sale of the equity of redemption, making further advances to the mortgagor, is entitled to add them to his mortgage as against the purchaser. The rule seems to me to be a just one, and I should desire to extend it to every case to which it could fairly be applied. I think that a mortgagee purchasing the equity of redemption must be intended to deal very much on the faith of his security, and therefore the principle would seem to apply. If the mortgagee advance money on a judgment he is presumed to deal on the faith of his security; and I think the presumption is not stronger in this case than the other. It is true that under such circumstances the plaintiff in a foreclosure suit and here founds his claim upon the fact of his being a purchaser for valuable consideration without notice, which is certainly allowed to no other person than a mortgagee; and I have not been able to find a case in which such a claim was advanced by a mortgagee. I believe it however to be the law, and therefore think it right to concur in the proposed judgment. According to the view which I formed of the nature of the plaintiff's contract, I should not have thought it right to concede to him this privilege; but I consider that point determined the other way by the majority of the court, and therefore that it is not open to me to consider the question. It should

Judgment.

(a) Wigg v. Wigg, 1 Atk. 383.

however, I think, be referred to the Master to enquire 185 .
and state how much was *bona fide* paid by the plain-
tiff on his purchase before he had notice of the prior
purchase by *McDearmid*, with liberty to add the
amount to his mortgage. *McDearmid*, it would seem,
must be left to his remedy against *Lothian*

This court doth order, &c., that the plaintiff's bill do stand dismissed Decree.
out of this court as against the said defendant *James Lothian*, without
costs; and this court doth further order, &c., that the said bill of the
said plaintiff, in so far as the same seeks a specific performance of the
agreement in the said bill mentioned, do stand dismissed out of this
court as against the said *John McDearmid*, without costs. And this
court doth declare the said plaintiff to be a mortgagee of the premises
in the pleadings mentioned, and doth order and decree the same
accordingly:

Refer it to the Master to take an account of what is due upon the
mortgage security in the pleadings mentioned; and also an account of
what amounts in money, goods or securities (if any) were afterwards
bona fide paid or advanced to the said defendant *James Lothian* by the
said plaintiff, upon which amount the Master is to reckon interest up
to the period of twelve months after the making of his report, and to
add the same to the amount found due for principal money and interest
upon the mortgage security aforesaid up to the same period; and to tax
to the plaintiff his costs of this suit in so far as the same is a suit for
foreclosure and for the enforcement of the lien.

Upon payment thereof by *McDearmid*, plaintiff to convey to him, but
in default, then *McDearmid* to be foreclosed.

SOULES V. SOULES.

Alimony.

The court having, since its first establishment in this province (1537,) Mar. 25 and
exercised jurisdiction in cases for alimony, refused to question the May 2
right to exercise such jurisdiction in a clear case for relief.

The bill in this case was file by *Hannah Soules*
by *William Graham*, her next friend, against her Statement.
husband *William Soules*, setting forth acts of ill
treatment, as also threats used by the defendant,
rendering it unsafe for the plaintiff to reside with
him; and the statements of the bill, though denied
by the answer, were fully borne out by the deposi-
tions taken in the cause.

Mr. *McNab*, for the plaintiff, asked for the usual Argument.
decree in such cases.

1851.

Soules
v.
Nottola.

Mr. *Morphy*, for the defendant, admitted that the evidence taken in the cause was sufficient to prove the plaintiff's case; but he contended that the court had no jurisdiction to grant the relief prayed.

Judgment

May 2

THE CHANCELLOR.—The learned counsel for the defendant admits that a clear case for relief has been made out on the evidence, but he denies the jurisdiction. He argues that this court, as a court of equity, has no original jurisdiction in matter of alimony; and that the jurisdiction exercised by the ecclesiastical courts, which is administered by this court under the statute, is only exercised by those courts as incidental to proceedings for divorce, or for the restitution of conjugal rights.

This court, confessedly, has no jurisdiction to decree either a divorce or the restitution of conjugal rights. The construction contended for would, therefore, render the provisions of the statute almost, if not altogether, nugatory. But we are precluded, as it seems to us, from entering upon this enquiry. The jurisdiction in question has been assumed and exercised from the first establishment of the court. That practice, if erroneous, must, we think, be corrected by a higher tribunal.

The ordinary decree must therefore be pronounced.

That it be referred to the Master of this court to enquire into the circumstances and station in life of the said defendant, and to report to the court what sum, by way of alimony, ought to be paid annually or otherwise to the said plaintiff *Hannah Soules*, for her maintenance and support by the said defendant, regard being had to the station in life of the said parties and to the nature of the property of which the said defendant is possessed.

Further directions and costs reserved.

1851.

LAWRENCE v. JUDGE.

Practice—Injunction.

In a suit by the original owner of land and his vendee (to whom no conveyance had been made), the court upheld an injunction restraining an occupant of the land, and a person to whom such occupant had contracted to sell the timber on the lot, from cutting down the timber, such occupant having gone into possession under the owner; though it did not appear that such timber was of any peculiar value to the plaintiff, and though the affidavits were contradictory as to the occupant having had authority from the owner to sell the timber.

This was a motion to dissolve an injunction granted *ex parte* against the cutting of timber. Statement

Mr. Vankoughnet, Q. C. and Mr. Turner, for the defendant, contended that damages would compensate the plaintiffs for any injury they could possibly sustain by the felling of the timber, and the answer shews that an action of trespass had actually been brought, and was still pending, in respect of the property in question in this cause; that the injunction was against a party in possession, which is contrary to the doctrine laid down in all the cases. Argument.

They referred to and commented on *The Attorney General v. McLaughlin* (a), *Davenport v. Davenport*, (b), *The Attorney General v. Hallett* (c), *Curtis v. Buckingham* (d), *Beaufort v. Morris* (e), *Kinder v. Jones* (f).

Mr. Hector and Mr. Mowat, contra, cited *DeBouchout v. Goldsmid* (g), *Wood v. Leadbitter* (h), *Wallis v. Harrison* (i), *Crockford v. Alexander* (j), *Courthope v. Mapplesden* (k).

THE CHANCELLOR.—The object of this motion is the dissolution of an injunction, granted *ex parte*, to Judgment.

Apr. 11.

(a) Ante vol. 1, p. 34. (b) 7 Hare. 217. (c) 16 M. & W. 569. (d) 3 Ves. & B. 168. (e) 13 Jurist, 1068. (f) 17 Ves. 110. (g) 5 Ves. 211. (h) 13 M. & W. 838. (i) 4 M. & W. 538. (j) 15 Ves. 138. (k) 10 Ves. 290.

1851. restrain the defendants from felling timber on lots 13 & 14, in the 8th concession of Percy, alleged to be the property of the plaintiffs.

Lawrence
v.
Judge.

The application is rested on three grounds: first, because the principles upon which courts of equity interfere, in England, to restrain the destruction of growing timber, are inapplicable to the forest lands of this country, with respect to which, it is argued, that proprietors would be sufficiently protected by an action of trespass; secondly, because the plaintiff being out of possession is not entitled to the writ; and lastly, because the equity is denied by the answer.

Judgment. Unquestionably some of the considerations applicable to this subject in England operate with very diminished force here; but, in my opinion, there is no principle upon which we could refuse to landed proprietors in this province the same protection afforded to them in England. Timber here, as there, is part of the inheritance; being once destroyed, it cannot be set up again; the injury is irreparable, in the sense in which that term is used in relation to this subject, if not with reference to the extent—although that may be so occasionally—certainly with regard to the nature of the injury. Our refusal to interfere on that ground would therefore, in my opinion, be unwarrantable.

I am further of opinion, that the principles upon which *Webster v. The South Eastern Railway Company* (a), and other cases of that class, have been decided, has no application here. The defendants here do not deny the plaintiffs' title, in the sense in which that term is used in those cases; on the contrary they admit it. They establish that privy of title, the absence of which obliged *Lord Cranworth* to

(a) 15 Jurist, 73.

refuse relief in the case which was cited ; a conclusion arrived at with reluctance upon the authorities (b).

1851.

Lawrence
v.
Judge.

Upon the question whether the equity set up by the bill has been displaced by the answers, the matter stands thus : *Judge* states certain negotiations for the purchase of lot 13, under which he affirms that he entered into possession, and admitting that such treaty had not ripened into contract—he swears that he was, nevertheless, authorised by *Lawrence*, pending the treaty, to dispose of all the growing timber for his own behoof, should the negotiation succeed, but subject to account should it fail. The authority under which *Judge* asserts that he acted was verbal. No evidence of it exists, save that furnished by his own answer. It is negatived by the plaintiff *Church*. And the transaction took place more than a year before the contract under which the other defendant, *Foulds*, claims. *Judge* represents *Lawrence* as having promised to visit the land at some future period, not explicitly stated in the answer, in order to a final arrangement, and as having failed to observe that promise ; yet, notwithstanding such failure, and without further communication with his principal, he contracts for the sale of all the timber on lot 13—which would seem to be of considerable value—to the defendant *Foulds*. Judgm nt.

Now the design of the plaintiff in entering into these arrangements with *Judge*, is sworn to have been the preservation of this timber. That is not denied by the answer. It is sworn that *Judge* himself was restrained from felling timber, beyond the few acres he was authorised to clear. That allegation in the plaintiff's affidavit is only met indirectly by the alleged agency ; and yet that defined object is hardly to be reconciled with the indefinite and in

(a) Davenport v. Davenport, 7 Hare, 217.

1851. every way unsatisfactory power set up by the defendant. But without dwelling further upon this inconsistency—for there are improbabilities in the narration on both sides—we think the whole transaction involved in too much obscurity to warrant us in dissolving this injunction without further inquiry. It would be, I think, highly unsafe were we to permit these parties to denude this land of all its timber—in which its chief value, so far as we can judge, consists—under a contract entered into by an agent, whose authority is not alleged to have been other than verbal; conferred at a time long antecedent to the contract; unsubstantiated by any other evidence than that of the agent, and attended, at the least, with circumstances of improbability.

La wrence
v.
J udge.

J udgment.

Such would have been, in my opinion, the proper conclusion had this been a motion to dissolve upon the answer, under the practice which formerly prevailed; for the rule that the equity must be confessed upon the answer did not, I apprehend, mean that the answer should contain such an admission of facts as would entitle the plaintiffs to a decree, but this, merely, that the court should see from the facts admitted by the answer, that there is a question to be tried before the court can safely allow the exercise of the legal right sought to be restrained. Under the present practice, where the answer is of no greater weight than an affidavit, the propriety of continuing the injunction cannot, I think, be doubted.

1851.

O'KEEFE v. TAYLOR.

Specific performance.—Waiver of Title.

Where a party went into possession under a contract for the purchase of a lot of forest land, in order to clear and cultivate it, and thereby raise the purchase money which was to be paid by instalments—on a bill filed by the purchaser, for a specific performance of the contract—*Held*, that he had not, by going into possession, waived his right to a reference as to title; and that he was bound to pay his purchase money into court, pending the enquiry before the Master. April 8 & 11.

The facts of this case appear in the previous report (a).

After the judgment then pronounced had been given, a question arose when the minutes were being drawn up, as to the right of the plaintiff to have an enquiry as to title, and whether the decree should direct the purchase money to be paid into court, or to the defendants, within a period to be limited; and, in default, that the bill should be dismissed. And the matter was now spoken to by

Mr. *Strong*, for the plaintiff. A purchaser is always entitled to a reference as to the validity of the vendor's title, unless he has done some act to waive his right. He submitted that the possession taken by plaintiff in this case, was not such an act as could properly be construed into a waiver of his right to demand a reference. Argument.

In England on a sale of lands, an abstract of title is furnished, and if a vendee either accepts or retains possession without objection, he will be held to have waived the reference.

Borroughs v. Oakley (b), is a direct authority in favor of the position taken by the plaintiff.

(a) Ante, 95. (b) 3 Swans. 168.

1851.

O'Keefe
v.
Taylor.

Argument.

He contended also, that no money should be ordered either into court or to be paid to the vendor, until after the report of the Master as to title. He also referred to *Fleetwood v. Greene* (a), and *Sugden* on Vendor's, 398.

Mr. R. Cooper, for the defendants, objected to any reference as to title being directed. Judgment was given on the hearing, and nothing was said on the point either by the court, or suggested by counsel.

In this case, it is shewn that possession had been taken by the plaintiffs in 1842, and no objection was ever raised, either before or at the hearing, as to the goodness of the title the vendor was able to make. *Borrourghs v. Oakley* is distinguishable from this case as there the bill was filed by the vendor. He cited also the *Margravine of Anspach v. Noel* (b), and the language of the Master of the Rolls in delivering judgment in *Fludyer v. Cocker* (c).

Mr. Strong—The *Margravine of Anspach v. Noel*, shews that the possession, such as was taken by the plaintiff, is no waiver of the objection as to title.

April 11. THE CHANCELLOR.—Two points, not noticed upon the hearing, have been discussed by arrangement between the parties—first, whether the plaintiff has, under the circumstances of this case, waived his right to investigate the title; and secondly, whether the plaintiff should be ordered to pay his purchase money into the court.

It was not contended that the original contract between these parties, was for a purchase with the defendant's title; such a contract might have been made, no doubt; but there would not have been the

(a) 15 Ves. 394. (b) 1 Mad. 310. (c) 12 Ves. 27.

shadow of a ground for such an argument here. The memorandum of sale negatives that. The question here is, therefore, whether the plaintiff has by his conduct, subsequent to the contract, waived his right to investigate the title. In my opinion, great injustice would follow from an indiscriminate application of English cases upon this doctrine, to the materially different circumstances of this country; but upon their strict application, the plaintiff here has not, I think, waived his right to a reference. The Master of the Rolls, in *Burroughs v. Oakley*, designates the right of the vendee to a good title, as "his ordinary equitable right;" and so carefully does this court guard that right, that where the title is doubtful, it is not in the habit of determining that question, but refuses specific performance. Now, whether that right has, or has not, been waived, is in each case a question of fact. Before the vendor can be exempted from the ordinary duty of deducing a good title he must bring himself within the exception: the court must see clearly that such exemption is the result of the agreement of the parties; or, if not the result of express agreement, it must be fully satisfied under the evidence, that the vendee intended to waive, and in fact did waive his ordinary and equitable right to a good title. Where possession has been taken by the vendee, not under the contract, or by permission of the vendor, but forcibly, that has been regarded not as a waiver of any particular objection to the title, because that step may have been taken before the delivery of an abstract, and without any knowledge of the subject, but rather as such an assumption of the right of property by the vendee, irrespective of the state of the title, as amounts to a declaration on his part that nothing more remains to be done but the execution of the conveyance, and a reference has been refused upon that principle—treating the conduct of the vendee as an acceptance of the vendor's title (a). On

1851.

O'Keefe
v.
Taylor.

Judgment.

(a) Colcraft v. Roebuck, 1 Ves. jun. 221.

1851.

O'Keefe
v.
Taylor.

the other hand, where possession has been taken by the vendee with a knowledge of particular defects in the title, the court has frequently been satisfied by that and other circumstances that the vendee had waived such defects, and specific performance has been decreed upon that ground without a reference. But where the contract itself provides for the interim possession of the vendee, without impairing his right to call for a good title; or where, the contract being silent upon the subject, possession is taken prematurely by consent of both parties, without any information as to the title, and before the time appointed for the completion of the contract, and without any stipulation as to the waiver of the vendor's right to have a good title deduced, in such cases the application of the ordinary rule about taking possession becomes obviously impossible.

Judgment.

Here the purchase money was payable in three annual instalments, and upon payment in full the property was to be conveyed. Having reference to the mode of dealing in this country in relation to such matters, their conduct must, I think, be understood as stipulating that a good title should be deduced on payment of the last instalment. Upon the execution of the contract, the vendee was admitted into possession by the vendor, not having at that time or subsequently, so far as the evidence shews, any information as to the state of the title. Can the court say that it is the just conclusion from these facts, that this vendor intended, on taking possession, to waive his right to have a good title made out, which title, by the very terms of the contract, was not to be made out for three years after possession had been so taken? No case has been cited which would warrant us in giving that effect to possession taken under such circumstances; and such an intendment would be, in my opinion, repugnant to reason.

It is argued, however, that the intendment of 1851. waiver, if not fairly deducible from the mere possession, does nevertheless follow from the dealing of the vendee with the property in question during his possession. But upon that subject the general rule is, that acts of ownership, after an authorized possession, are unimportant. As was observed by the Master of the Rolls in *Burroughs v. Oakley*, the same principle applies to acts of ownership; "for what could be the purpose or advantage of taking possession except to act as owner?" Now, without considering the effect which, in England, would be attributed to acts of ownership of this particular character, I am of opinion that nothing has been done here which, with reference to this species of property, and in this province, ought to be regarded as evincing an intention on the part of the vendor to waive his right to establish the title. Under this contract, for the purchase of a tract of unoccupied forest, the vendor is permitted to enter into possession, with liberty to deal with the property in the only way in which such possession could be rendered beneficial—namely, by felling the timber. That is the only mode in which the soil can be made available for agricultural purposes. The course pursued here may be an extremely improvident course on the part of the vendor prior to the investigation of the title; but it affords, in my judgment, no ground to conclude that the vendee intended to waive his right to a good title (a).

O'Keefe
v.
Taylor.

Judgment.

Upon the second question, I am of opinion that the defendant is entitled to have the purchase money paid into court. It is true, as a general rule, that a vendor cannot have both the estate and the money (b). That consequence may follow from the peculiar form

(a) *Stephens v. Guppy*, 3 Rus. 171; *Osborne v. Harvey*, 1 Y. & C. C. C. 116; *Blackford v. Kirkpatrick*, 6 Beav. 202.
(b) *Wickham v. Evered*, 4 Mad. 53; *Young v. Duncomb*, 1 Yon. 275.

1851. of the contract or dealing of the parties; but where
 O'Keefe it is contrary to the intention of the parties that the
 Taylor vendee should hold possession without paying his
 Judgment purchase money, or where he has been guilty of
 unreasonable delay, the court will order the purchase
 money into court even before answer (c).

In this case the plaintiff did continue in possession without paying his purchase money, contrary to the intention of the parties; he did unreasonably delay the execution of the contract; and although such conduct would not justify a determination that he had waived his right to investigate the title in the way of punishment, they make it proper that the vendee, asking a reference, should be ordered to pay his purchase money into court (d).

CORRIGAL V. HENRY.

Executor—Probate and Surrogate Courts.

Where a bill was filed by devisees against the executors of their testator's will, alleging the inability of the executors to attend to the trusts of the will, on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead; the court dismissed the bill, on the ground that the jurisdiction to interfere in such a case belongs to the Probate and Surrogate Courts, and not to the Court of Chancery; and inasmuch as the executors had been brought before the Court without any fault on their part, the bill was dismissed with costs.

Jan. 21 and
 March 18.

The bill in this case was filed by *William, Charlotte, Elizabeth and Catharine Corrigan*, against *Robert Henry* and *William Nourse*, and, amongst other things, stated that the late *Jacob Corrigan* had, by his last will, appointed the defendants and one *Alexander Christie* who had been and still was absent from this province, but where the plaintiffs could not discover) executors of his will, and thereby devised all his property to his said executors, in trust

(c) 1 Sug. V. & P. 251, 11th ed. (d) *Clarke v. Wilson*; 15 Ves. 317.

for his four children—the plaintiffs—with a devise over to certain of his grand-children, in the event of the death of his daughters.

1851.

Corrigal
v.
Henry.

That probate of the will had been delivered to the defendants, and that large sums of money, stocks, &c., were outstanding and vested in their names; and some still remained outstanding in the name of the testators.

The bill then alleged that *Henry*, from advanced age and indisposition, and *Nourse*, from the bad state of his health, were both unfit to transact business, and thereupon prayed that a reference might be made to the Master to approve of a fit and proper person, &c. to be appointed trustee, &c. in the place and stead of the defendants.

The allegations of the bill were all either admitted by the answer or proved in evidence.

Mr. *Turner* for the plaintiffs.

Argument.

Mr. *Wilson*, Q. C. for the defendants.

Doyle v. Blake (a), and *Graysbrook v. Fox* (b), were cited.

THE CHANCELLOR.—This is a case of the first impression. To interfere in the way contemplated by this bill would be, in effect, to grant administration with the will annexed. That is a power which this court has never assumed. Where the circumstances, or misconduct of the executor affords just ground for apprehension, this court frequently interposes, through the medium of a receiver, and otherwise for the protection of the estate. But even that jurisdiction was assumed of necessity, owing to the

March 18.

Judgment.

(a) 2 S. & L. 245. (b) Plowd. 275.

1851.

Corrigal
v.
Henry.

decisions at common law which negated the power of the ecclesiastical courts to demand security under such circumstances (a). Here no such defect exists. The power of the spiritual courts to grant administrations, "*durante corporis aut animi vitio*," has been recognized from very early times (b), and although the books do not seem to furnish any very remote precedents, the power has been recently exercised on various occasions (c). This subject was considered by Lord Brougham in *Ex parte Evelyn* (d), who obtained from Dr. Lushington a certificate of the practice of the ecclesiastical courts in such matters, in accordance with the above statement, upon which his lordship acted.

Judgment.

Inasmuch, therefore, as the Probate and Surrogate Courts in this province are clearly authorised to afford the relief sought in this suit—and inasmuch as this court, at all events, would not seem to possess any jurisdiction in the matter—we are of opinion that this bill must be dismissed.

With respect to the costs of the suit, it is obvious that the executors who have been brought here without any fault on their part must be indemnified. It is equally plain that we cannot order those costs to be paid out of the estate, because, amongst other reasons, some of the parties interested in the estate have not been brought before the court. The necessary result is that the costs must be paid by the plaintiffs.

(a) *The King v. Simpson*, 1 W. B. 455. (b) *Hills v. Mills*, Salk. 136. (c) *In re Cramp*, 3 Phil. 497; *In re Phillips*, 2 Add. 336. (d) 2 M. & K. 4.

1851.

TOWNSLEY V. CHARLES.

Pleading—Specific performance—Statute of Frauds.

Where the plaintiff by his bill sought to compel the specific performance of a contract, which, from the statements of the bill it was plain had been created by parol, and that the plaintiff relied on acts of part performance to take the case out of the Statute of Frauds: *Held*, that it was not necessary that the defendant should do more than claim the benefit of the statute, without alleging that there had not been a note in writing.

March 28 &
May 20.

The bill in this case was filed for the purpose of compelling the specific performance of a contract, entered into for the sale by the plaintiffs to the defendant of a piece of land in the city of Toronto. It appeared by the bill that the plaintiffs had executed and delivered a bond to the defendant, conditioned for the conveyance of the land in question; that the defendant had paid several sums for interest on the purchase money, the receipts of which were endorsed on the bond. The bill alleged that after the execution of the bond the defendant had gone into possession of the lands, and had exercised acts of ownership over them; "and, amongst other ways, by offering them for sale, and entering into and carrying on negotiations with divers persons for the sale of the said lots, or some or one or more of them, by going over the said lots at different times as entitled to the possession thereof."

The bill further stated, that the defendant having fallen in arrear, the plaintiffs offered to rescind the contract and take back the lands, but this the defendant refused to accede to, unless the plaintiffs would refund one-half of the moneys paid by the defendant on account of the interest on the purchase money; and set forth several applications by the plaintiffs to the defendant for payment, and certain negotiations in relation thereto.

1851.

Townley
v.
Charles.

The defendant, by his answer, insisted on the Statute of Frauds as affording a full defence to the suit; admitted the contract as alleged; the execution of the bond; the payment of interest, and the endorsement of the receipts on the bond; but denied any possession, although entitled thereto.

Argument.

Mr. *Mowat*, for the plaintiffs, contended that the defendant, having admitted the contract, and not having alleged that there was not any evidence of it in writing, he could not avail himself of that defence, although he had claimed the benefit of the statute. All the precedents shew the allegation to be necessary; and there is no precedent or authority the other way.

Without such an allegation, a defendant does not bring himself within the statute; and besides, the rule is, that a defendant in equity must pledge his oath to the truth of his defence. So, the Statutes of Limitations must also be pleaded or set up by the answer, with the necessary allegations to shew that the case falls within them.

White's Leading Cases, 527, note; *Willis* on Pleading, 613; *Spurrier v. Fitzgerald* (a); *Kine v. Balfe* (b); *Rock v. Cullen* (c); *Sanders v. Benson* (d); *Adams v. Barry* (e); *Newton v. Preston* (f); *Mus-sell v. Cook* (g), were cited on this branch of the case.

If wrong in this position, he then contended that acts of part performance had been shown sufficient to entitle the plaintiff to succeed.—*Franklin v. Fearn* (h); *Curtis v. Marquis of Buckingham* (i), and *Gunter v. Halsey* (k), were also cited.

(a) 6 Ves. 548. (b) 2 B. & B. 343. (c) 6 Hare, 531. (d) 4 Beav. 350. (e) 2 Coll. 285. (f) Prec. Ch. 103. (g) Prec. Ch. 533. (h) Barnad. 30. (i) 3 V. & B. 168. (k) Amb. 586.

Mr. *Turner*, for the defendant.—The laches of the plaintiffs are sufficient to disentitle them to the relief asked; but if not, then, he submitted, that as there was not any contract or note in writing signed by the defendant only—the writing evidencing the contract alleged to have been entered into in this case being signed by the plaintiffs only—the court cannot possibly decree a performance of it.

1851.

Townley
v.
Charles.

Argument.

THE CHANCELLOR.—The sole defence to this bill for specific performance is the absence of a sufficient memorandum in writing within the Statute of Frauds.

May 20.

Judgment.

The plaintiff's answer is two-fold; he contends that this defence is not open upon these pleadings—the defendant having merely claimed the benefit of the statute, without denying the existence of a note in writing; and he relies, secondly, upon certain acts of part performance as sufficient to take the case out of the statute.

Had the bill stated the agreement generally; and had the defendant, admitting the agreement as stated, and not alleging that it rested in parol, contented himself with craving the benefit of the statute—had that been the state of the record, we incline to the opinion that the argument of the learned counsel for the plaintiff ought to have prevailed. But it is unnecessary to decide that point now, because we think that the bill plainly proceeds upon a parol agreement, and relies exclusively upon part performance as taking the case out of the statute. Under such circumstances, it cannot be necessary that the answer should negative that which is disaffirmed by the bill itself.

Upon the second point, it is, we think, obvious that no act of part performance has been shewn sufficient, within the authorities, to take the case

1851. out of the statute, and that this bill must therefore
be dismissed; but, under all the circumstances, with-
out costs.

Towneley
v.
Charles.

MEACHAM V. DRAPER.

Executor—Receiver.

A bill was filed in 1846, by devisees against executors, charging them with improper conduct in the management of the estate; and the answers were all filed within a year afterwards. No further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court, under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate.

Argument. Mr. McDonald, for the plaintiff, cited *Middleton v. Dodswell* (a). Mr. Vankoughnet, Q. C., for defendant Draper. Mr. Mowat for the executors of Moore.

Judgment. ESTEN, V. C.*—The will in this case directed that the interest and rents of the real and personal estate should be applied to the support of the widow and children of the testator, until the youngest child should attain twenty-one; and then that, subject to certain legacies, the whole property should be divided between them, in equal shares.

It does not appear that either the legacies or debts were charged on the lands. The testator died in 1832, entitled to three acres in Bayham, upon which a saw-mill was erected; and a lot purchased from the Canada Company, of which scarcely any part of the purchase money had been paid; and to a supposed interest in five acres of land in Bayham, which five acres he directed to be sold, and the proceeds to be disposed of in the same manner as the rest of his

(a) 13 Ves. 266.

* The Chancellor gave no judgment.

property. Two persons, of the names of *Hamilton* and *Moore*, and the defendant *Draper*, were appointed executors. They sold the whole of the lands after the testator's death, and took back a mortgage in fee to secure part of the purchase money, under which the legal estate in the three acres became vested in them. Of the lot purchased from the Canada Company, the legal estate remains in that body. The bill was filed in 1846, at which time the youngest child had attained twenty-one. The answer was filed in the summer of 1847. The present application is for a receiver of the real and personal estate, and is supported by an affidavit. Under the circumstances above stated, I do not think any ground is laid for appointing a receiver of the personal estate. Whatever ground may have been shown by the answer for this proceeding, cannot at this distance of time be insisted on; and no new ground is laid in the affidavit. We think it right, however, to grant the motion as to the real estate, of which, for the purposes of this motion, *Draper* seems to be a mere trustee, and with respect to a part of which some neglect is alleged on his part, although there seems to be an equity of redemption in *Crawford*. *Moore* is dead; and whether the legal estate in the three acres has survived to *Draper*, who appears to be exclusively in possession, or is vested in him and the heir or devisee of *Moore*, it is unnecessary on this occasion to determine. The personal representatives of *Moore* have been made parties by bill of revivor, and have been served with notice of this motion, as it would appear, unnecessarily. They must receive their costs. The other costs will be reserved.

SPRAGGE, V. C.—The facts, so far as they are material to the matter of this application, are shortly these:—*Levi Ryan*, the testator, under whose will the plaintiffs claim, made his will in July, 1832, and

1851.

Meachem
v.
Draper.

Judgment.

1851. thereby—after directing that his debts should be paid from the debts due to himself, if sufficient, and if not sufficient, then that his property in vessels, or so much thereof as might be necessary, should be sold and applied to that purpose; after providing for the support and maintenance of his widow and children until his youngest daughter should become of age, and upon that event that \$500 should be paid to his widow, and \$300 to his brother *Connor Ryan*—he proceeds to say, “at which time (his youngest daughter attaining her majority) it is my desire that all the residue or remainder of the property, of every description, may be equally divided among my daughters *Emily Ryan* and *Arritta Ryan*,” and he appoints *James Hamilton*, *Elias Moore* and *Isaac Draper*, his executors. The testator appears to have died in the same month in which he made his will; his widow and his two daughters subsequently married, and their husbands and themselves, together with the testator's brother, *Connor Ryan*, are the plaintiffs in this suit. The three executors named in the will were defendants to the original bill, and one of them (*Moore*) having since died, the suit was revived against his personal representatives; and one *Elias Moore*, who it is alleged had confederated with *Lindley Moore*, his brother, and one of the executors of *Elias Moore*, deceased, and obtained possession of the will and estate of the deceased.

Judgment.

Arritta, the youngest daughter of the testator *Ryan*, appears to have attained her majority before bill filed, but how long does not appear.

The bill in this suit was filed in November, 1846; the answer of *Draper* in July, 1847, and the answer of *Hamilton* in November of the same year; the other defendant, *Moore*, appears to have died before answer. This application is supported by the affidavit of *Bethnell Lobdell*, one of the plaintiffs, the

husband of *Arritta Ryan*, who states that *Hamilton*, 1851.
 one of the executors named in *Ryan's* will, never
 proved it, nor acted as executor thereof; that *Draper*
 is the sole acting executor of *Ryan's* will—and as
 such, is in the receipt of the rent of premises pur-
 chased by testator from *James* and *Hiram White*,
 consisting of about three acres of land, on which are
 a saw-mill and some houses, the rental of which is
 about 100*l.* a year; that the mill and houses have
 been allowed to become dilapidated, *Draper* taking
 no measures to keep them in proper repair; that a
 portion of the roof of the saw-mill has been off since
 last spring; that there is great danger to all the build-
 ings from fire; that one of the houses lately took fire
 from a chimney which is not higher than the roof—
 the fire communicating from the chimney to the roof—
 and that the chimney remains in the same state; and
 that he has been informed and believes that none of
 the premises are insured. The deponent adds, that
 he, and he believes all the other plaintiffs, are appre- Judgment.
 hensive that the testator's estate has already been
 seriously wasted by defendant *Draper*, and is in
 much danger of being further materially reduced,
 wasted and endangered, unless a receiver be ap-
 pointed.

This affidavit was sworn on the 23rd, and filed on
 the 27th of December last, and no counter affidavit
 has been put in; the allegation in *Lobdell's* affidavit
 remains, therefore, uncontradicted.

The answer of *Hamilton* declares his entire ignor-
 ance of all the affairs of *Ryan's* estate, and that he
 never interfered therewith or acted under the will.
 By the answer of *Draper* it appears that he and
Moore acted under the will; that in 1836, being
 pressed, as they say, for payment of *Ryan's* debts,
 they took upon themselves to sell to one *Lagourge*
 certain real estate of the testator, or rather his in-

1851. *Meacham v. Draper.* terest therein, a portion only of which they were authorised by the will to sell; the three-acre mill lot mentioned in *Sobdell's* affidavit was sold among others, and this they had no authority to sell; the price agreed upon was 1500*l.*, of which 500*l.* was paid down. *Hiram* and *James White*, from whom the testator purchased, had made no conveyance up to his death, and on the sale to *Lagourge* they, with the assent of all parties, made a conveyance to *Lagourge* direct, and he executed a mortgage in fee to *Draper* and *Moore* for 1,000*l.* balance of the purchase money—the legal estate therefore was in *Draper* and *Moore*; *Lagourge*, after this, assigned to one *Crawford*, and default having been made in payment of the balance due on the mortgage, ejectment was brought by *Draper* and *Moore* against *Crawford*, and he was dispossessed under a writ of *habere facias possessionem*, in 1845.

Judgment.

The application is now made by the parties beneficially interested under the will, that a receiver may be appointed, in order to his getting in the rents, keeping the premises in repair, and insuring them; the duty of the executors and trustees under the will was, upon the youngest daughter of the testator becoming of age, to divide this property; whether a sufficient time intervened between her coming of age and the filing of the bill for a division to be made, does not appear, but the executor and trustees had dealt with it in a manner unauthorized by the will, and had themselves created obstacles in the way of making the division which they were bound to make; the parties were entitled to this division in 1846, and there appears no reason to doubt that they are now entitled that such division shall be made; no question as to this is raised by the answers.

Where the *title* is in question, and the equitable interest claimed by the plaintiff is disputed hostilely

by those having the legal estate, the court will interfere with reluctance, and only in case of fraud and of imminent danger to the property in question if the intermediate possession should not be taken under the care of the court (a); but the reason for this reluctance to interfere against the legal estate does not apply when the party has an equitable interest, not disputed by the person having the legal estate, and the court can be morally certain that the plaintiff must succeed. *Metcalfe v. Pulvertoft* (b), and *Podmore v. Gunning* (c), are authorities upon this point—still a case must be made for the interference of this court. Here, the parties entitled to the property in question to be divided between them, join in asking that until a division be made in pursuance of the testator's will the property may be taken care of under the direction of the court; and they shew, as cause, negligence on the part of the trustees in possession in not preserving the property, and danger of destruction to the buildings by fire. The application is not to take from the possession and charge of the trustee property now in his charge by the will of the testator, which would be interfering with the intention of the testator as expressed by his will—but property which, if the trustees had followed the directions of the will, would not now be in his charge, but vested in those now seeking that it should be placed under the protection of the court. I think that the plaintiffs have made a case which, under the circumstances, entitles them to this. The counsel of *Draper* has not, indeed, *opposed* this application, feeling, I suppose, that the granting of it could not operate to the injury of his client. It has, however, become proper for the court to see that a sufficient case is made for the appointment of a receiver over the three-acre mill lot, but not of any

1851.

Meacham
v.
Draper.

Judgment.

(a) *Lloyd v. Passingham*, 16 Ves. 58, and 3 Mer. 697. (b) 1 V. & B. 180. (c) 5 Sim. 435.

1851. other part of the testator's estate—as to that, no negligence or misconduct is shewn. The affidavit refers to apprehended loss to the estate, from its being wasted by *Draper*, but only in vague and general terms; and it is not clear to me whether he intends to refer to the estate generally, or only to the three-acre mill lot previously referred to in his affidavit.

Mencham
v.
Draper.

July 1. ent.

I agree in the view taken by my brother *Esten*, as to the costs of this application.

PRENTISS V. BRENNAN, RE BUNKER.

Practice—Partnership—Sequestration—Substitutional service.

April 15,
May 11 & 17,
and June 10.

In a suit in which a receiver of partnership effects had been appointed and a sequestration issued against the defendant for contempt, the court retained a motion against third persons for delivery or payment to the receiver or sequestrators of a promissory note, the property of the partnership, transferred subsequently to the issuing of the injunction and sequestration, but before the note became due by the defendant, in a foreign country, the affidavits as to the *bona fides* of such transfers being contradictory; the court giving leave to file a bill against such third persons.

Where after the issuing of an injunction and sequestration in a partnership suit against the defendant, a transfer was made of a promissory note, part of the assets of the partnership; and the plaintiff having filed affidavits impugning the *bona fides* of the transfer, the court gave leave to the plaintiff to serve a notice of motion to compel the delivery or payment of the note to the receiver or sequestrators in the cause, upon the party to whom the note had been transferred, out of the jurisdiction; and such party having appeared upon and opposed the motion, substitutional service of the subpoena to answer was ordered to be made on his solicitor or agent, in a suit afterwards brought against him, by leave of the court, for the same purpose.

Statement.

The defendant in this suit having absconded to avoid service of process, as noticed in previous reports of the cause—and having taken with him some of the assets of the partnership, transferred to one *Weston Bunker*, residing at Oswego, in the State of New York, a promissory note made by one *John Bongard* in favor of *Conrad Bongard*, and endorsed by the payee in blank; the name of the partnership or any member of it not appearing on the note, al-

though it had been delivered by *John Bongard* to the defendant, as the managing partner of "*Prentiss & Brennan*," in payment of a debt due by him to the partnership. The note had not become due at the date of the negotiation to *Bunker*.

1851.

Prentiss
v.
Brennan,
re Bunker.

The plaintiff having, as he alleged, reason to doubt the *bona fides* of the transaction, sought to have the amount of the note paid either to the receiver or the sequestrators, and asked the court for leave to serve notice of motion to that effect on the attorney of *Bunker*, in whose hands the note had been recently placed for collection.

The Court refused to grant the application, but ordered that service of the notice of motion might be made on *Bunker*, at Oswego, proof of the service thereof to be given by affidavit, sworn before the Mayor of that city.

The plaintiff thereupon served *John Bongard*, *Statement.* *Bunker*, the attorney of *Bunker*, and the solicitor of the defendant, with a notice addressed to them respectively, of his intention to move that *John Bongard* might be ordered to pay to the receiver or the sequestrators in the cause, or into court to the credit of the cause, on or before, &c., the sum of 183*l.* 13*s.* 5*d.*, being the amount of a promissory note due on, &c., made by the said *John Bongard*, and in the affidavits filed in support of the motion more particularly referred to; and that *Weston Bunker*, or the attorney of the said *Weston Bunker*, might be ordered to deliver up the said note to the said receiver or sequestrators, or that the same might, on the principal money and interest being paid by the said *John Bongard*, be delivered up to the said *John Bongard*, and that the said *Weston Bunker*, his attorney, &c., might be ordered to stay all further proceedings in his action at law against the said *John Bongard* and others on the said note,

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 re *Bunker.*

or that the said plaintiff or the receiver or sequestrators aforesaid might be at liberty to institute proceedings at law or in equity, or both, for the purposes aforesaid, or some of them, and that all proper directions might be given in reference to such proceedings; or that such other order might be made as to the Court should seem proper.

The motion coming on this day,

Argument.

Mr. Mowat, for the plaintiff: *Bongard*, the maker of the note, consents to pay the amount into Court, and submits to any order the Court may think proper to make. It is clearly shewn that the note was partnership property, and the transfer having been made after the issuing of the writ of sequestration, *Bunker*, although he has filed an affidavit stating that he knows not of any other claim than that of *Brennan*, is bound by *lis pendens*, which is as good as actual notice—*Gaskell v. Durlin* (a), *Hood v. Aston* (b), and although he received the note in a foreign country, still he took it subject to all the defences that are open to the parties interested in this court. *Brennan* merely going across the lines cannot by such means entitle himself to transfer property which he was incapable of doing in this province; if such a proceeding were tolerated, it would cause great inconvenience and hardship in a country situated as this is with respect to the neighbouring republic.

If the rights of parties were doubtful, a reference or issues would be directed, but where upon the facts disclosed the matter is clear, such a course is not necessary, and the Court will order immediate delivery of the property in dispute.—*Dixon v. Smith* (c), *Russell v. East Anglian Railway Company*, (d).

(a) 1 Ball & B. 169. (b) 1 Russ. 412. (c) 1 Swan. 457. (d) 14 Jurist, 967.

Here the transfer of the note was affected by acting in contempt of the orders and process of this Court, and which he submitted added force to the present application.

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It may be questioned whether the sequestrators are entitled to receive the proceeds of the note, still it is clear that the receiver is; here we have both, so that no difficulty can arise in that respect.—*Rowley v. Ridley* (a), *Gomme v. West* (b), *Angel v. Smith* (c), and an anonymous case reported in 6 *Vesey*, 287, shews that the same rule prevails in regard to receivers and sequestrators; and *Bond v. Roberts* (d) shews that the Court will act in cases where third parties are not parties to the suit. He also cited and commented on *Johnson v. Chippendall* (e), *Wilson v. Metcalfe* (f), *Franklyn v. Colhoun* (g), *Goddard v. Ingram* (h), *Jones v. Yates* (i), *Lucas v. De Lacour* (j), *Stephens v. Babcock* (k).

Mr. *Turner*, for *Bunker* and *Brennan*, objected that *lis pendens* could not be constructed into being notice of a matter, which, so far as any person could by the closest scrutiny discover, had no connection whatever with the business of the partnership. Besides the proper course for the plaintiff to have taken was to file a bill against *Bunker*.—*Jervis v. White* (l), *Collyer on Partnership*, sec. 341 and note. *Shaw v. Wright* (m) is an authority to shew that a receiver and sequestration cannot co-exist.

Mr. C. W. *Cooper* also appeared for *Bunker*.

THE CHANCELLOR.—The plaintiff asks, by the present motion, that one *Bunker*, the holder of a

Judgment.

(a) 3 Swans, 306. (b) 2 Dick. 472. (c) 9 Ves. 335. (d) 13 Sim. 400. (e) 2 Sim. 55. (f) 1 Beav. 263. (g) 3 Swans. 276. (h) 3 Q. B. 839. (i) 9 B. & C. 532. (j) 1 M. & Sel. 249. (k) 3 B. & Ad. 354. (l) 7 Ves. 413. (m) 3 Ves. 22.

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certain promissory note, be ordered to deliver the same to the sequestrators in the cause, upon the allegation that it constitutes part of the assets of the partnership, and has been transferred to *Bunker*, either without consideration, colourably, or with such notice of the circumstances as affects the holder with the fraud attributed to *Brennan*.

Process of sequestration, in my opinion, affects choses in action (a); otherwise a sequestration would seem to be a mere form.

The Court has jurisdiction where real estate is in possession of third parties claiming title (b), and I am unable to discover any principle of reason upon which choses in action should be exempt.

Judgment. Some learned judges would seem to have intimated that there is a distinction between a mere debt and a tangible chattel in the possession of one claiming title (c). The principle upon which the distinction proceeds, if indeed there be any distinction, is not very apparent; but if well founded, it is obviously in favor of the application.

But, although the Court has jurisdiction, we are clearly of opinion that the question cannot be properly disposed of, in the circumstances of this case, upon motion.

It is one thing to affirm that process of sequestration affects choses in action, quite another that it is to be made effective by order upon motion. It is a matter of discretion. The Court is careful, however, not to dispose of the question of property, except in simple cases, upon motion. As *Sir James Wigram*

(a) *Wilson v. Metcalf*, 1 Beav. 263; *Bird v. Littlehales*, 3 Swan. 299. (b) *Reid v. Middleton, T. & R.* 455; *Empringham v. Short*, 3 Hare, 471. (c) *Franchlyn v. Calhoun*, 3 Swan. 310.

has expressed it,—“the Court sees what is necessary to be done to try the question of right, and it then puts it in the way of trial (a).”

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Upon the merits the plaintiff rests his case upon two grounds, irrespective of the question whether the transfer was colourable merely—first, actual notice; secondly, constructive notice, upon the doctrine of *lis pendens*.

As to the first, *Bunker* denies notice, and affirms that he is a *bona fide* purchaser for value. His deposition is certainly open to observation, and the affidavits in support of the motion present several facts of great importance in the decision of the question which do not seem to us to admit of much doubt. But it would be obviously improper, I think, to dispose of the question of property, in a case of such conflict, upon motion.

With respect to the second ground, I felt considerable doubt during the argument upon two points—first, whether the transactions of a foreigner, in a foreign country, could be affected by *lis pendens* in this Court (b); secondly, whether the doctrine of *lis pendens* would apply to a negotiable security, not the specific subject of the suit, and not particularized either in the pleadings or evidence (c). But it becomes unnecessary to determine these points now, because we are of opinion, as I before intimated, that the question of title cannot be disposed of upon the motion.

Judgment.

The case to which we were referred, in *Barnewell & Cresswell's Reports* (d), would seem to determine that an action of trover could not be maintained by

(a) *Empringham v. Short*, 3 Hare, 470. (b) *Worseley v. Earl of Scarborough*, 3 Atk. 392; Com. Dig. tit. Chancery, (4 c. 3); 2 Fonbl. Equity, 153, note n.; 1 Story E. Jur. sec. 405; New. Law of Contracts, page 506. (c) *Wallace v. Earl Donegal*, 1 Drury and Walsh, 461, S. C.; 5 C. & F. 666. (d) 9 B. & C. 532.

1851. *Prentiss*, under the circumstances of this case. For that and other reasons, the proper course will be, we think, to direct a bill to be filed by the plaintiff (a).
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Without deciding against the jurisdiction to restrain the action upon the present motion, we are of opinion that such a course, under present circumstances, would be improper.

ESTEN, V. C.—The bill in this case was by one co-partner against the other, for the adjustment of the partnership affairs, and complained of fraud alleged to have been committed by the defendant against the plaintiff.

Judgment. A receiver had been appointed in an early stage of the cause. The defendant had absconded with the partnership books, and all or a large portion of the securities of the firm: one of these, a promissory note made by one *Bongard*, for the use of the firm, but bearing neither the name of the firm nor that of either of the partners, was delivered by the defendant, while out of the jurisdiction and under the circumstances which have been stated, to one *Bunker*, at the city of Oswego, in the State of New York, pending a suit which had been instituted in that State by the plaintiff against the defendant, for purposes similar to those of the present suit, and after the defendant had been arrested on a *ne exeat*, issued in that cause. These facts were most probably known to *Bunker* at the time of the negotiation of the note; and although it is stated that he purchased the note for a valuable consideration, it does not appear what this consideration was, nor whether it has actually been paid. *Bunker* having commenced an action in this province for the recovery of the note, the present application was made to

(a) Hood v. Aston, 1 Russ. 412.

secure in effect the amount of it, as part of the joint effects, for the benefit of the firm, on the ground that no effectual negotiation of it had taken place. The application at first view seemed to be of an important nature—raising not only the question as to the proper mode of dealing with a chose in action, when claimed by sequestrators or a receiver, but of a chose in action, so circumstanced and in the hands of a third person holding it adversely to both parties. Property, of which a receiver has been appointed, may be in possession of the defendant to the suit, or his agent, or of a third person; and it may be tangible or recoverable only through the medium of legal process. It is clear that where it is in the possession of the defendant to the suit, or his agent or tenant, he or his agent will be ordered to deliver it, and his tenant will be ordered to attorn to the receiver. The law cannot be said, I think, to be involved in any doubt, as it respects tangible property under such circumstances in the possession of a third party claiming title to it. The owner of the property would be compelled to institute legal proceedings for its recovery; but the court, it is clear, is under no such necessity. In the case of *Bird v. Littlehales*, sequestrators sought the possession of property which was claimed by a third person, and the court ordered him to submit to an examination *pro interesse suo*, or in default that a writ of assistance should issue; or, in other words, the Court took upon itself to decide the question of property; for I apprehend it to be clear that if the party claiming had submitted to the examination, and it had appeared clearly from such examination that he had no title, he would without further trial have been ordered to deliver possession to the sequestrators. The rule must be the same with regard to chattels of a tangible nature. If claimed by a third person, the court must at least have the same power as it has with regard to lands; it must have the power to

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order the claimant to be examined *pro interesse suo*, or in default to deliver possession to its officer. At least, this much is I think clear, that if the third party claiming the property in question makes title to it under the parties to the suit, or either of them, and the question concerns only the *bona fides* or validity of the alienation under which he claims, the Court will undertake the determination of that question. If however, the party in possession claims by title paramount, and is not connected in privity of title with any party to the suit, it may be a correct proposition to say that in no case can the Court assume jurisdiction to decide between the conflicting claims of the parties, but that legal proceedings are absolutely necessary for the establishment of the title. The case of the greatest difficulty occurs when the property of which possession is sought consists of a chose in action. The question has been, whether the Court as it issues a writ of assistance in the case of lands, and orders delivery in case of a chattel, will in like manner order payment in case of a debt, which appears to be the only method by which the sequestrators or receiver can be put in possession of this description of property. In such a case the alleged debtor may either deny that the debt ever existed, or he may claim a discharge from it under a disposition by one of the parties to the suit. It appears to be quite settled that where the debtor does not dispute his liability, the Court will order payment to the receiver. In the case of *Wilson v. Metcalfe* (a), the late Master of the Rolls said, that in a clear and simple case the Court would probably order payment, or protect a voluntary payment; and in cases of more difficulty, would direct proceedings to be instituted. When the Court appoints sequestrators or a receiver, the duty devolves upon it of putting its own officers in possession of the property which the appointment was intended

Judgment.

(a) 1 Beav. 263

to affect, and it will not shrink from the performance of this duty, although it may involve an adjudication upon the rights of third persons; and it is possible that when the subject is thoroughly investigated, and the law upon it finally settled, it may be found that the distinction which has been adverted to is not wholly without foundation—namely, that where the property of which possession is sought is in the possession of the defendant to the suit, or his agent or tenant, or a person claiming in privity of title under him, the court will in the first instance undertake the determination of the right, having in its power to direct the institution of legal proceedings for the information of its conscience, should it be found necessary; but that where the property in question is claimed by a third party, by title paramount or adverse, it will in all cases direct an action or suit to be commenced and prosecuted for the establishment of the defendant's title against the adverse claimant. In the present case it is unnecessary to settle what course the Court would pursue in the case of a chose in action, of which the origin is disputed, or of an adverse title. The property which forms the subject of the present application is indisputably a part of the partnership effects, which is claimed by *Bunker* by virtue of a disposition of it made by the defendant, the *bona fides* of which is the matter of contention. It is neither a chose in action nor the subject of an adverse or paramount claim. I do not doubt the power of the Court to have ordered an examination *pro interesse suo*, or an issue, staying the proceedings at law in the meantime, upon payment of the money into court, *Bongard*, the debtor, not disputing his liability; but the learned counsel for the plaintiff, desiring to insist on the doctrine of *lis pendens*, which could not come in question in any common law proceeding, it was thought best to direct a suit to be instituted. The *prima facie* case made on the affidavits was, in my

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1851. judgment, sufficient to warrant the Court in interfering in a manner which could not do the claimant any material injury, in order to have the matter investigated before he could be permitted to receive the subject in dispute, and remove with it beyond the jurisdiction of the Court.

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SPRAGGE, V. C., concurred.

June 10.

Mr. *Mowat*, for the plaintiff, moved for leave to effect service on *Weston Bunker*, by serving his attorney in the action at law, or the solicitor who acted on his behalf in this suit; and *Brennan*, by serving his solicitor in this cause with the subpœna to appear and answer the bill filed in pursuance of the leave granted by the Court in giving judgment on the previous motion.

Leave granted accordingly.

FARWELL V. WALLBRIDGE.

Practice—Injunction.

April 22
and May 2.

An *ex parte* injunction had been granted to restrain the defendants, until further order, from interfering with certain saw logs in the Salmon River, and which the plaintiff claimed as his; the defendants having, notwithstanding, obtained possession of the logs, a motion to extend the injunction so that, in effect, the plaintiff might receive possession of the logs from the defendants, was retained until after issues should be tried as to the plaintiff's property in the logs, this being disputed by the defendants.

Statement.

The bill in this case was filed on the 10th of April, 1851, by *Samuel Farwell* against *Francis Wallbridge* and *Daniel D. Fox*, and stated that the plaintiff being possessed, as owner, of 4,000 saw logs, in the township of Richmond, and lying in the Salmon River, which flows through that township, and after flowing through the township of Tyendinaga, falls into the Bay of Quinte; he (the plaintiff) commenced during the spring of that year, by his servants, &c., to float

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the logs down the river, and they were then in progress down the river; and so soon as the logs should arrive at the mouth of the river, the plaintiff intended to float them to the Oswego River, in the State of New York, for the use of extensive saw mills of the plaintiff there; that the said Salmon River was a public river, and had ever since the first settlement of the country been used as such, and particularly for floating down saw logs and timber of all descriptions; that the said saw logs were of peculiar value to the plaintiff, and that he had depended upon procuring them for his said mills, to enable him to carry on his business of manufacturing and selling sawed lumber, and had made all his arrangements on the faith of obtaining the said logs; that if the logs were detained or taken from him he could not obtain others in their place for the supply of his mills; that one of the plaintiff's mills was idle waiting for the saw logs, and the men employed in the mills would, in the event mentioned, be kept idle for several months, and perhaps for the whole season, and divers engagements which the plaintiff had made for the supply of sawed pine lumber it would be impossible for him to fulfil.

Statement.

That the plaintiff would, if deprived of the said logs, be subject to very great loss and damage, both directly and indirectly, the extent and amount of which it would be impossible with any accuracy to estimate; that the defendants were also engaged in floating saw logs down the said Salmon River; that Fox rented and was in possession of a saw mill in Tyendinaga aforesaid, on said river, and Wallbridge was in possession of a saw mill at Shannonville lower down the river.

The bill then alleged that the defendants had combined together to possess themselves of these logs, and to appropriate them to their own use res-

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pectively—with which view they had contrived to intermingle a few logs of *Wallbridge* with the logs of the plaintiff, and had unsuccessfully endeavoured also to intermingle therewith a few logs the property of *Fox*; but that the logs of plaintiff, except a small number thereof, had been marked with the letters "A. F." stamped thereon with a marking iron; and for the purpose of further identifying them, one notch had been made with an axe at the end of the log, which marks still remained on them, unless defaced by, or by the orders of, the defendants.

Statement.

That at the commencement of the said month of April, (and on or about the fourth day thereof,) the plaintiff had most of the logs temporarily secured in a boom, about a mile above the mill of *Fox*, but that the boom had since been cut by the defendants, for the purpose of enabling them to carry out the object they had, as aforesaid, combined to accomplish; and that at the time of filing the bill the defendants were dividing between them the logs belonging to the plaintiff, and by means of a boom placed by *Fox* in the river, were preventing part of the said logs from passing the mill of *Fox*, with a view of being retained there and appropriated to the use of *Fox*; and that the defendants designed and threatened to retain and appropriate the rest of the plaintiff's logs at the mill of *Wallbridge*, by throwing a boom or log across, or placing some other obstruction across or in the said Salmon River, at the mill of *Wallbridge*, and thus preventing them passing that mill; and that the defendants had threatened and intended to use violent means against the plaintiff, his servants, &c., in case the plaintiff should attempt to remove such obstructions, or to separate his logs from those of the defendants, or to convey his logs beyond the said mills respectively.

The bill prayed an injunction, which was in part

granted *ex parte*, restraining the defendants, their agents, &c., "from preventing the saw logs of the said plaintiff, in the said bill mentioned, from being floated down, or otherwise passing down the River Salmon—that is to say, those saw logs of the said plaintiff which are on their way down the said river, and which have not yet reached the boom of the said defendant *Daniel D. Fox*, in the said bill mentioned, and also all other saw logs of the said plaintiff which have passed the said boom and have not reached the boom of the said defendant *Francis Wallbridge*, in the said bill also mentioned, and from defacing or altering any of the marks on the said saw logs, or on any other saw logs in the said bill mentioned, or any of them, which have been put thereon by way of identifying and distinguishing them as the saw logs of the said plaintiff, and from sawing up or in any manner injuring or destroying the same, or any or either of them; and from selling or disposing of any of the said logs, so marked as aforesaid, of the said plaintiff."

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Statement.

The bill was supported by affidavits filed by the plaintiff, and was answered by the defendant *Wallbridge*. The plaintiff having given notice of his intention to move to extend the injunction so granted, to the effect that the defendants, their servants, &c., might be restrained from "taking or retaining possession of any of the said saw logs of the plaintiff, which may be or may have been intermingled with any saw logs of, or claimed by, the defendants, or either of them; and from interfering with or preventing the said plaintiff, his agents, &c., from taking or holding possession of the said logs, and from interfering with or preventing the said plaintiff, his agents, &c., from separating and removing such of the said saw logs of the plaintiff as have been already or may be intermingled with the saw logs of the said defendants, or either of them, or of any other

1851. person or persons;" a number of affidavits were filed against the motion.

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On the affidavits so filed, and the answer of *Wallbridge*, the defendants disputed the existence of any combination between them; the plaintiff's title to the logs in question, and the possibility of distinguishing the logs claimed by the plaintiff from others intermingled with them and belonging to each of the defendants; and asserted this intermingling to have been the fault of the plaintiff's workmen. The defendants made no joint claim to any of the logs in question.

This statement seems all that is necessary for the understanding of the case.

Argument.

Mr. Mowat for the plaintiff.

Mr. Turner for the defendants.

The following cases were cited as bearing on the question:—*Fuller v. Richmond* (a); *Pusey v. Pusey* (b); *Lloyd v. Loaring* (c); *Earl of Macclesfield v. Davis* (d); *Dewhurst v. Wrigley* (e); *Duke of Somerset v. Cookson* (f); *The Mayor of London v. Bolt* (g); *Lowther v. Lowther* (h); *Robinson v. Lord Byron* (i); *Lane v. Newdigate* (j); *McCrea v. Holdsworth* (k); *Rankin v. Huskisson* (l); *Greatrex v. Greatrex* (m); *Whitelegg v. Whitelegg* (n); *Davis v. Leo* (o); *Davenport v. Davenport* (p); *Chedworth v. Edwards* (q).

The construction of the provincial statute 12 Victoria, chapter 30, and the effect of a license to cut

(a) *Ante* 33. (b) 1 Vern. 273. (c) 6 Ves. 777. (d) 3 V. & B. 16. (e) 1 C. P. Coop. 319. (f) 3 P. W. 390. (g) 5 Ves. 129. (h) 13 Ves. 95. (i) 1 B. C. C. 588. (j) 10 Ves. 192. (k) 12 Jur. 820. (l) 4 Sim. 13. (m) 1 D'G. & S. 692. (n) 1 B. C. C. 57. (o) 6 Ves. 784. (p) 13 Jur. 227. (q) 8 Ves. 46.

timber granted thereunder, was argued at some length, but as the points raised are not affected by the judgment of the Court, it is considered unnecessary to state them.

THE CHANCELLOR.—The plaintiff asks, in effect, by his present motion, the specific delivery to him of a quantity of saw logs, possession of which is said to have been obtained wrongfully by the defendants.

With respect to the jurisdiction to make such an order as is now asked—mandatory in effect, though prohibitory in form—courts of equity have frequently expressed a strong disinclination to attain their object in that indirect manner (a). In a case recently under the consideration of *Sir James Wigram* (b), his Honor remarked—"I may also observe, with regard to the form of the injunction which is asked, that if the plaintiff had applied in direct terms that I should order the captain to carry the ship to Liverpool, I could not, perhaps, on motion have done so; but an injunction restraining him from permitting the ship to remain in the port of London, or any other place than Liverpool, is indirectly ordering that the ship be taken to Liverpool. The Court has always expressed great disinclination to grant injunctions in a form which has no meaning, except as it compels a party to do a positive act." This form of writ seems to have been devised for the purpose of avoiding a doubt entertained as to the jurisdiction of a court of equity to order an act to be done upon motion. The objection urged on recent occasions, however, has not been so much an objection to the jurisdiction, as to this indirect mode of exercising it; but the practice has been so repeatedly sanctioned by judges of the greatest eminence, that it seems to us

(a) *Blackmore v. Glamorganshire Canal Company*, 1 M. & K. 154.
(b) *Sedgett v. Williams*, 4 Hare, 465.

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no longer open to discussion (a). But in this case the question is one of substance rather than form. Has this court jurisdiction to secure for the plaintiff the enjoyment in specie of the chattels which form the subject of this suit, under existing circumstances? And, assuming the jurisdiction, can we properly interfere, upon interlocutory application, prior to the establishment of the legal right?

Judgment

Upon the first point, the learned counsel for the defendants, admitting the principle upon which we proceeded in *Fuller v. Richmond*, contended that the case referred to turned upon the fiduciary relationship which there subsisted between the parties, and argued that the extension of the jurisdiction to a case of trespass would be without precedent. Clearly, *Fuller v. Richmond* was decided upon the fiduciary relationship; and wherever that circumstance is found, the nature of the chattel becomes indifferent. But, whilst the jurisdiction in cases of this description is well established, its limitation in the way contended for would be, in our opinion, quite unwarranted. It has been exercised from a very early period, in the absence of any such relationship, where compensation in damages was thought to afford an incomplete remedy. In the case respecting the alter-piece (b), the Pusey Horn case (c), and others of that class, the chattels in question happened, from their peculiar nature, not to admit of being replaced; that was an accidental circumstance, not essential to the principle upon which those decisions were rested. It must not be understood that the jurisdiction is limited to chattels of that description. The inadequacy of the common law remedy furnishes the true principles upon which those cases proceeded; and wherever, either from the intrinsic nature of the chattel, or from extrinsic circumstances, or from the nature of the

(a) Lane v. Newdigate; Earl of Mexborough v. Bower, 7 Beav. 133, and cases cited. (b) Duke of Somerset v. Cookson. (c) Pusey v. Pusey.

apprehended injury, the Court finds either that damages cannot be satisfactorily assessed, or that an assessment of damages by a jury would afford inadequate compensation; wherever, in short, justice cannot be fully administered except by protecting the interest of the owner of the chattel in specie—this Court has been, in all such cases, disposed to assume that jurisdiction. It has sometimes been considered, indeed, as an established rule, that equity will not interpose to restrain a mere trespass (a). But if this Court can properly interpose, under certain circumstances, to secure to the owner the enjoyment of a specific chattel, against a party claiming title, it is difficult to conceive a principle upon which it should, under similar circumstances, decline to act against a wrong-doer. Such a limitation of the jurisdiction cannot, we think, be sustained upon the authorities. In a recent case, before *Sir James Willes* (b), that learned judge observes, “in some cases, however, this Court has very usefully interposed to restrain what appeared to be only a trespass; but the proposition is too large, that in every case where parties are alleged to be about to commit a trespass, which may be attended with destruction to a specific chattel, an injunction will be granted. Supposing the nature of the injury apprehended is such as to render it impossible to measure the amount of damages; or if the case be one in which any calculation, as to the amount of the injury, must be purely speculative—the inclination of the Court has, in general, been to protect the party in the enjoyment of the property in specie.”

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Now the present case appears to us to present several distinct grounds to authorise the exercise of the jurisdiction which has been invoked. These chattels have a peculiar intrinsic value; the owner

(a) *Jones v. Jones*, 3 Mer. 161. (b) *Ridgeway v. Roberts*, 4 F. & R. 116.

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But, besides, those grounds, there are other considerations, applicable to this country and to this peculiar species of property, which must not be overlooked. These logs form the staple, if I may speak, of a very extensive and lucrative manufacture carried on in this country. To deprive the plaintiff of this property, would not be to subject him to the loss of its mere value as raw material, but it would be to deprive him of all the profit derivable from the manufacture, leaving his invested capital, in the meantime, unproductive. Were we to refuse the assistance of this Court, we should enable the defendants to inflict an injury, which, if it admit at all of any satisfactory measurement of the amount of damages, would be, most certainly, very inadequately compensated by the verdict of a jury. And yet, from the nature of such property, and the manner in which it is necessarily brought to market, it is peculiarly liable to the species of depredation complained of by the plaintiff in this case. Now, did we decline to interpose for the plaintiff's protection, in relation to such property, and under such circumstances, we should, in my opinion, not only limit the jurisdiction of the Court most injuriously, as regards suitors, but in a way warranted neither by principle nor authority.

Then, assuming the plaintiff to have stated a case entitling him to the assistance of the Court, the question is, whether we should retain the motion until the establishment of the legal right, or grant the injunction now; thereby, in effect, giving to the plaintiff exclusive possession of property which he is confessedly about to withdraw from the jurisdiction of the Court.

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It is quite impossible to lay down any strict general rules upon the subject; we can only state the general principle by which the exercise of this jurisdiction is governed. Now, where the Court acts in furtherance of a legal right, and, ancillary to it, there are obvious and forcible reasons why, as a general rule, it should take care to see the legal right established before it interposes by injunction (*a*). I do not mean to represent that as an invariable rule; cases may perhaps arise in which it would be proper to interfere, even at the hearing, without a trial at law. Still as a general rule, such is unquestionably the practice of the Court. But, although the general practice be such, yet very great latitude and discretion is allowed to the Court in dealing with such applications (*b*). It may, upon interlocutory motion, grant the injunction *simpliciter*, without more; a course which, though quite competent to the Court, and necessarily so, is seldom adopted in contested cases. I am necessarily competent to the Court, because cases may arise where the title is admitted, or so plainly established, that it would be absurd to say to a plaintiff, you must go to law and prove your case there, before we grant this injunction (*c*); and on the other hand, cases might arise where the whole object of the injunction would be defeated, were such a course pursued (*d*). But although it is quite competent to the Court to pursue that course, the more regular and wholesome practice is, either to retain the motion, with leave to institute proceedings at law, or to grant the motion, giving at the same time directions for the ascertainment of the legal right. The course proper to be pursued in each case is for the determination of the Court, under all the circumstances.

Judgment.

In determining the order proper to be made in the

(*a*) *Spottiswoode v. Clarke*, 2 Phil. 154. (*b*) *Mintley v. Downman*, 3 M. & C. 1; *Bacon v. Jones*, 4 M. & C. 433; *Ridgway v. Roberts*, 4 Hare, 106; *Rogers v. Howell*, 6 Hare, 325. (*c*) *Stevens v. Keating*, 2 Phil. 333. (*d*) *Prince Albert v. Strange*, 1 Mc. & G. 25.

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present case, the question which first occurs is, has the plaintiff shewn satisfactorily his legal title? In considering that point I have felt some difficulty, from the manner in which the title has been stated (a). Whether the plaintiff means to claim these logs as having been improperly cut within Roblin's license, and so his property, under the 12th Victoria, ch. 30; or as grantee of the crown, under a seizure made by the proper officer; and whether, assuming him to claim under the crown, he asserts title to any logs other than those cut within that license, are questions which seem to me to be involved in considerable doubt. Upon that subject, the best opinion we have been able to form is, that it is open to the plaintiffs, upon these affidavits, to insist upon all those grounds of title. Then, taking that to be so, what are the facts? With respect to a considerable number of the logs in question, it is asserted that they were cut within Roblin's license. Not only is that not denied in the affidavits, but it was distinctly admitted upon the argument. The answer of *Wallbridge*, indeed, contains a general denial of the plaintiff's title, but at the same time it admits the facts upon which that title depends. Now, with respect to that portion of the property, the plaintiff seems to us to have established his case so satisfactorily, that we should have felt ourselves warranted, but for the difficulty to which I shall presently advert, in interposing on his behalf to any extent which the practice of the Court would have authorised. But, with respect to the residue of the logs, questions of law and fact arise, which must, as it seems to us, be disposed of elsewhere. These, it is sworn very positively, were cut in the township of Sheffield, without Roblin's limits; and, in respect to them, three questions arise—first, was it competent to the crown to transfer any property in them, except in the mode pointed out by the statute; secondly, did the crown, in fact, intend to

(a) *Costelli v. Cook*, 7 Hare, 89.

transfer to Roblin any logs except such as were cut within his limits; lastly, had that which was done the effect of vesting in Roblin the property in any logs cut without his limits. Then, if it should turn out that there is a portion of the logs to which the plaintiff has no title, and that such portion has been mixed, by his own act, with the other portion to which he has a title in such a way as not to be distinguishable, the defendants contend that the necessary effect of such intermixture is, to preclude the possibility of a specific delivery.

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Now, not to prejudice these questions by expressing any opinion of our own, this much is, we think, obvious, that we could not properly grant the injunction asked by this motion under such circumstances. The property will be preserved *in medio*, pending the trial of the issues which we propose to direct, by the injunction already granted. We have not lost sight of the risk which we incur, by interposing even to that extent, of inflicting upon the defendants that species of irreparable damage from which we are asked to shield the plaintiff, should he fail to establish his title. Whether we should have so inferred, in case it had been found impossible to dispose of such issues in time to have rendered our interference really available to the plaintiff, we need not consider. We feel that, so long as that was possible, we could not refuse to act to that extent, upon affidavits which seem to us to preponderate greatly in favor of the plaintiff, against parties who, upon the evidence before us, appear to a great extent mere wrong-doers.

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Upon the objection to the suit, as being multifarious, we have felt considerable doubt; but the conclusion at which we have arrived upon that point is, that the objection should not be allowed to prevail upon the motion (a).

(a) Costelli v. Cook, 7 Hare, 89.

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*Mortgage—Sale by Sheriff—Privileged communications.*January 7,
and May 20.

Upon a judgment obtained against the executors of a mortgagor a writ against the lands of the testator was sued out, under which his interest in the mortgage premises was sold; and afterwards the purchaser at Sheriff's sale obtained a conveyance of the legal estate from the mortgagee—all which transactions took place after the passing of the statute 7 Will. IV. ch. 2 [1837]: *Held*, that under such circumstances the devisees of the mortgagor were entitled to redeem.

Where an execution had issued against the goods and chattels of the testator, and his widow (the executrix) desired that the writ might be returned *nulla bona*, and a writ against lands sued out, under which the money might be made out of certain lands pointed out by the widow, and which was done accordingly, and a sale there effected: *Held*, that the sale so made bound her interest in the property, notwithstanding that the property had been mortgaged by the testator, and that an equity of redemption could not be sold under common law process.

Where a defendant in a cause expressed to her attorney her desire that a certain course should be adopted in reference to a writ in the hands of the sheriff, which course in consequence thereof was accordingly pursued: *Held*, that this was not a privileged communication.

Statement. The circumstances which gave rise to this suit, and the arguments of counsel, are so fully set forth in the judgment of the Court as to render any statement of them here unnecessary.

Argument. Mr. Strong, for the plaintiffs.

Mr. Vankoughnet, Q. C., for defendant.

The following cases were cited:—*Sandon v. Hooper* (a); *Frimbleston v. Hamill* (b); *Du Vigier v. Lee* (c); *Hodges v. Croyden Canal Company* (d); *Seaton v. Taylor* (e); *Lemax v. Hide* (f); *Ramsden v. Langley* (g); *Perry v. Smith* (h); *Weeks v. Argent* (i); *Baugh v. Cradocke* (j); *Nicholson v. Hooper* (k); *Acton v. Pierce* (l); *Neeson v. Clarkson* (m); *Webb v. Rorke* (n); *Fulham v. McCarthy* (o); *Simpson v. Smyth* (p); also *Storey's Eq. Ju. sec. 1016*; *Spence's Eq. Ju. vol. 2, p. 808*.

(a) 6 Beav. 246. (b) 1 Ball & B. 385. (c) 2 Hare, 334. (d) 3 Beav. 86. (e) 3 U. C. Q. B. R. 303. (f) 2 Vern. 185. (g) 2 Ver. 535. (h) 9 M. & W. 682. (i) 16 M. & W. 817. (j) 1 Moo. & R. 182. (k) 4 M. & C. 179. (l) 2 Ves. 480. (m) 4 Hare, 97. (n) 2 S & Lef. 661. (o) 12 Jurist, 757. (p) 3. U. C. Jur. 129.

ESTEN, V. C.*—This suit is for the redemption of 1851.
 a piece of land, situated in the city of Toronto, ^{Walton}
 which was mortgaged in fee by *Matthew Walton*, the ^{v.}
 then owner of the fee simple of it, by deed dated the ^{Bernard.}
 30th of April, 1832, to *John McGill*, for securing the
 sum of 200*l.*, payable on the 30th of April, 1835,
 with interest half-yearly in the meantime. Default
 was made in payment of the mortgage money and
 interest; and in the year 1834, *Matthew Walton* died,
 having made his will, dated the 23rd June, 1832,
 and a codicil to it, dated the 6th August, 1834,
 whereby he disposed of the equity of redemption of
 the mortgaged premises in such a way that, apart
 from anything that may have since occurred to de-
 prive them of their interest in it, the present plain-
 tiffs would now be entitled to the whole of it
 amongst them; the widow having a moiety, or its
 equivalent, during her life, and the remainder be-
 longing to the children in equal shares, except that ^{Judgment.}
 the eldest son, *Jacob Walton*, may be entitled to his
 brother *Robert's* share as well as his own. *John Mc-*
Gill, the mortgagee, also died, having made his will
 dated the 8th of November, 1834, whereby he gave
 all his real and personal estate to his executors
 thereby appointed, their heirs, executors and admin-
 istrators, upon certain trusts; and the residue of his
 estate to *Peter McGill*, one of his executors. By
 indenture of bargain and sale, dated the 1st of Sep-
 tember, 1838, the executors of *John McGill* trans-
 ferred the mortgage to Mr. *Blake*, to whom they
 likewise conveyed the legal estate in fee of the mort-
 gaged lands. Mr. *Blake*, on the 19th of January,
 1839, conveyed the mortgaged lands to one *Rowland*
Burr in fee; and *Rowland Burr* on the 31st of
 December, 1840, conveyed them in like manner to the
 defendant. It appears, that after the death of *Walton*
 a judgment was obtained against his executors and

* The Chancellor gave no judgment.

1851. executrix by *Joseph D. Ridout* for a considerable amount, and an execution was issued upon this judgment against the lands of *Walton*. It having been agreed between the widow Mrs. *Walton* and the creditors that the writ against goods should be returned *nulla bona*, and the amount of the judgment levied from the lands, she pointed out the land in question in this cause as the particular lands which she desired to have sold for this purpose; and a note was delivered, at her request, to the sheriff, calling upon him to offer these lands for sale. I have not seen the exemplification of the judgment, or of the writ, nor the sheriff's deed, but I take it to be admitted that there was such a judgment and execution, and a sale under it, at which Mr. *Blake*, as stated in the answer, purchased the property in question. This sale must be deemed on Mr. *Small's* evidence, to have taken place in pursuance of the arrangement which he details. The property appears to have been purchased at this sale for 200*l.*, and no doubt the usual sheriff's deed was executed on this occasion, and the purchase money applied, as far as it would go, to the payment of the judgment debt. This occurred in 1838, shortly previous to the assignment of the mortgage from the executors of *John McGill* to Mr. *Blake*. It appears to have been supposed, from this time, that the absolute property in the lands had been acquired by means of the assignment of the mortgage, and the supposed purchase of the equity of redemption. I apprehend that up to the assignment of the mortgage by the executors of *John McGill* to Mr. *Blake*, and until after the purchase by the defendant, or at all events by *Burr*, nothing had occurred of a particular nature with respect to the property in question. The way the answer states the matter is as follows:—It submits that by reason of the property having been vacant and unoccupied, *John McGill*, and afterwards his executors, and then Mr. *Blake*, the purchaser, must be deemed to have

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been in legal possession of the property; but that until it was purchased by the defendant, it was wholly unproductive. It describes the defendant himself as having entered into possession of the property, and made very considerable improvements upon it; and this fact is fully established by the evidence, which at the same time seems to represent the improvements, made on the property, as having been commenced by *Burr*. What was done in this way by *Burr*, however, was of an inconsiderable nature and was done after his purchase, which occurred, as already mentioned, in 1839. The defendant's purchase was completed on the 31st of December, 1840, and from this time the main improvements made on the property commenced. I apprehend it to be clear that no alteration whatever occurred in the state of this property, and that it was entirely unproductive until the small improvement made by *Burr*, and which, as already observed, did not take place until the year 1839. The price of the property advanced considerably after the supposed union of the mortgage title and the equity of redemption. *Burr* paid 625*l.* for the property, and the defendant 1340*l.*; at least, it is so stated in the answer. The language of the answer, with respect to the possession and the state of the property, is as follows: "and this defendant says he believes that upon the execution of the indenture last mentioned, the said *William Hume Blake* entered into possession of the premises, the same being then in an unproductive state." Then after stating that the defendant, immediately upon the execution of the conveyance to him by *Burr*, entered into possession of the premises, and continued in possession of them until the year 1846, when *John Walton* took possession of them against the will of the defendant—and that he thereupon, by an action of ejectment, recovered possession of them, and has remained in possession of them ever since—the answer proceeds thus: "and

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1851. this defendant says he believes the said premises were always vacant and unproductive, and yielding no rents or profits, up to the time of their occupation by this defendant; and he believes that the said *John McGill*, and after him his executors and the said *W. H. Blake* and *R. Burr*, respectively, may have had such constructive possession of the said premises as attached to their legal title by reason of the same being unoccupied." And the answer further says, "that at the time the defendant entered into possession of the premises, and for some time thereafter, the same were in an unproductive state, yielding no rents or profits;" and he then proceeds to state that thereupon, believing himself to be the owner of the property, he made some valuable improvements upon it. With respect to the improvements, it is proved that *Burr* put up one or two frames and planted an orchard; and that the defendant finished the frames, built another house, erected some fences, and made some other improvements. It appears to me clear that these mortgaged premises continued in the same state, from the time of the execution of the mortgage until the commencement of the improvements which have been mentioned by *Burr* and the defendant, and which were not begun until the year 1840, or 1839 at the earliest. The suit is instituted by the plaintiffs as claiming under the will of *Walton*, against the defendant, for the redemption of the premises, under the circumstances which have been detailed. The defendant has raised several defences to the suit, and various points arise for our decision.

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In the first place, the defendant insists that under the circumstances of the case, and by force of the 11th clause of the act commonly called "the Chancery Act," no redemption should be allowed at all. It is then contended that the disposition of the property, by means of the sheriff's sale,

with the consent of *Mrs. Walton*, is binding upon all the plaintiffs, or at all events that it is binding on *Mrs. Walton* herself; in which case she ought not to have been joined with the other co-plaintiffs, and the record is improperly framed; and that no redemption can be had during the lifetime of *Mrs. Walton*; upon which grounds the defendant contends that the bill ought to be dismissed; but, supposing the suit to be maintainable, and that redemption is to be allowed at this time, then that it should be only on all or some of the following terms—namely, the repayment of the whole of the purchase money paid by the defendant for the purchase of the property; complete exoneration from accountability for the rents and profits during the possession under the mortgage; and full allowance for the improvements. The plaintiffs in their turn contend against all these positions, and, moreover, insist that the defendant can claim interest only for six years before the commencement of the suit. An objection is made by the defendant to the evidence of the execution of *Matthew Walton's* will, as being insufficient. It may be right to advert to this in the first instance. I think it doubtful whether the evidence of the execution of the will is sufficient; but the due execution of the codicil, as affecting real estate, is amongst the admissions which are in evidence. The plaintiffs then make title under a will, the heir-at-law being before the court as one of the co-plaintiffs, and claiming partly in that capacity, and it of course being manifest that if there is such a will the plaintiffs are all entitled; if not, that the heir-at-law is entitled. Suppose, under such circumstances, the will, when produced, to appear not to have been duly executed according to the Statute of Frauds, so as to affect real estate, could the bill be dismissed? I think not. The result must be the same where the evidence leaves it doubtful whether there is a will or not; and in such a case it appears to me that inquiry

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should be directed in order to determine who is entitled. If this view is correct, then I think the will in this case ought to be assumed to have been duly executed, because that conclusion is more beneficial to the defendant, and the plaintiffs are of course bound by their own statement in their bill. It being assumed therefore that the will was duly executed, and that all the plaintiffs are entitled, so far as the will is concerned, to redeem this property, it becomes necessary to examine the objections which have been raised by the defendant to their exercise of this right. The first point to be considered is the supposed bar offered to redemption in this case by the provision contained in the 11th clause of the Chancery Act, before mentioned. It is difficult, however, to perceive any ground upon which in the present instance this defence can be rested. We cannot peruse the clause in question with proper attention without perceiving that the whole equity which it creates is built upon the absence of the ordinary remedies belonging to mortgagors and mortgagees respectively. It recites, in the first place, that the law of England had been introduced at an early period into this part of the province as the rule which was to govern all controversies relating to property and civil rights; but that owing to the want of an equitable jurisdiction, mortgagors, when out of possession, had been unable to redeem; and mortgagees had been unable to foreclose; and in consequence of the want of these remedies, cases might arise which would be open to peculiar equitable considerations, and a strict application of the rules which prevailed in England might work injustice. Now, all this recital can mean nothing else than this—that the act of 1791 introduced into Upper Canada the law of England, and created the abstract rights of mortgagor and mortgagee, but that as no Court of Equity existed, those rights could never be enforced until the passing of that act; and this peculiar state of things might

have given rise to extraordinary cases, which were not to be judged by common rules. With regard to the mortgagor, it is very obvious, and is, I believe, universally admitted, that the view of the legislature was that a mortgagor, who had been out of possession for such a length of time and under such circumstances that, according to the law, as it then stood, he would be debarred from redemption, might nevertheless, if the court should think fit, be admitted to the exercise of that right. Of course, if the whole period had not elapsed, which according to the law, as it then stood, would preclude him from redemption, he would not require the assistance or indulgence extended by the act. All he would have to do would be to file his bill to redeem. Then, with respect to the mortgagee, it is quite manifest that if he had never done anything upon his mortgage until any number of years after the passing of the act, his case could not be said to be attended with peculiar equitable considerations, and that any number or description of acts done after the passing of the act could not give any peculiarly equitable character to his case; because, having the power to foreclose, he was not justified in acting in an extraordinary manner without first exercising that right. It is the acting on the mortgage in the absence of any power to enforce the rights of a mortgagee, which constitutes the equitable case contemplated by the 11th section of the act. A mortgagee may, before the passing of the act, having no power to foreclose, and being quite uncertain whether he ever would have that power, but being desirous, if possible, of realizing his debt from the property, have taken possession of it, and proceed step by step to deal with it in such a manner, that when, after the passing of the act, the mortgagor should apply to redeem, it might be more consistent with equity to refuse than to permit the exercise of that right. Such was the case of *Simpson v. Smyth*, decided first in the Court of Chancery,

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then in the Court of Appeal, and ultimately in the Privy Council. It is said that in this case much reliance in the court, of ultimate resort, was placed on the fact of the mortgagee having obtained possession by means of an action of ejectment, and of the mortgagor not having availed himself of the opportunity thereby afforded him of redeeming the property. Upon this point it may be remarked, that the act extends in terms to all mortgagors who have been out of possession, and must, it would seem, contemplate the case of a mortgagor turned out of possession by means of an ejectment, that having been the most frequent mode in which mortgagors had been dispossessed; and, nevertheless, seems to extend the indulgence afforded by it to the case of such a person. It may be doubted, therefore, whether the circumstances of a mortgagor having been dispossessed through the medium of an ejectment, without any tender of the mortgage-money on his part, however proper it may be to consider it in conjunction with other circumstances, is *per se* entitled to much weight. Whatever effect, however, may be properly attributable to that fact, it does not enter into the case now under our consideration. No ejectment occurred here until the year 1846, and that was against only one of the parties. In the present instance, everything upon which any equity, under the 11th section of the statute, can be founded, was done after the passing of that act. The possession was a merely constructive one until after the purchase by Burr; and no considerable change was made in the condition of the property until some time after the defendant's acquisition of his own title, which occurred on the 31st of December, 1840. It does not appear to me, therefore, that any objection can be successfully raised on the 11th section of the Chancery Act, in bar of redemption in the present case. It is true that the clause in question embraces in terms all cases in which there has been a breach of

the condition before the passing of the act. The meaning of this however is, that all other cases are excluded from the operation of the clause, and that it *may* apply to all cases containing the requisites which it specifies. But the mere fact of the condition having been broken before the passing of the act, is not sufficient of itself to attract the operation of the clause in question. This fact must be combined with other circumstances, which, in my judgment, like the fact itself, must have occurred at the passing of the act.

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The defendant then insisted, as I understood, that the disposition by the executrix of the lands in question, for the payment of the debts of the testator, is valid and effectual, and binds those beneficially interested in the property; and as the sheriff's sale in the present instance was with the consent of the executrix, it was equivalent to a private sale by her, and is effectual as against the other devisees to vest the equity of redemption of these lands in the purchaser. But I apprehend it has never been seriously considered that the personal representative has any power of disposing of the real estate of the testator or intestate, by a private sale, so as to vest a title in the purchaser, or to give him a right to call upon the heir or devisee to convey to him. And the case to which we were referred, of *Seton v. Taylor*, seems to import the contrary; for the ground of the special demurrer there was, that the lands were not in the control of the executor; and the Court admitting such to be the case, held it to be immaterial. The defendant, however, contends that the sheriff's sale in this case was at all events binding on Mrs. Walton herself, by reason of her consenting to and sanctioning it, and had the effect of transferring her interest in the equity of redemption to the purchaser. After the best consideration which I have been able to give to

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this point, I am of opinion that Mrs. *Walton* is bound by the sale in question, as an act to which she was a party, and which therefore she cannot disturb or contravene; and that in effect her interest in the equity of redemption in this property is now vested in the defendant. The learned counsel, however, for the defendant, drew two inferences from this fact; in one of which I could not concur at all, and in the other only to a limited extent. He contended that there was a misjoinder of parties, which rendered it impossible to administer relief in this suit; and that in fact no relief at all could be administered during the lifetime of Mrs. *Walton*. The consequence of holding Mrs. *Walton* to be bound by the sheriff's sale, as I understand it, is to decide that she has no interest in the equity of redemption; from which it follows that the only persons who have a right to redeem this property are the co-devisees, and that she has no right to be a co-plaintiff with them. It is observable that even upon this supposition Mrs. *Walton* would, together with her co-executors, have a right to join with her children in redeeming this property, the mortgage being payable out of the personal estate of *Matthew Walton*; but, waiving this point, the only result is, that a person having no interest is joined as co-plaintiff with persons who have the entire interest, and are entitled to the whole relief to be administered in the suit. Now, whatever force or effect may be attributable to this objection, when it is made and can be disposed of at an early stage of the suit, it appears to me clear upon the authorities, that where the suit is properly brought to a hearing, although the objection be raised by the answer, the Court, where it can do justice to all parties, will not give effect to it. In this case, the objection is not raised by the answer; but even if it had been, I think the plaintiffs would have been justified in carrying the suit to a hearing, in order to take the opinion of the court upon it; and the suit having

therefore properly arrived at that stage, and it being competent to the court to do complete justice to all parties, as much as if the record had been framed with perfect propriety, the objection should not in my judgment prevail. The case of *Fulham v. McCarthy*, I think, has no application. In some of the other cases which we have consulted, it appears that the party improperly joined as a co-plaintiff would properly have been a defendant, and yet complete relief was nevertheless given to the other plaintiffs. The case is *a fortiori*, where the party improperly joined ought simply not to be before the court at all, and whose presence therefore may be altogether overlooked; which is the case here, so far as the defendant is concerned. The defendant, however, then objects that, at all events, no relief can be administered to the other plaintiffs during the lifetime of Mrs. Walton. But what is the necessity of delaying the justice to which these parties are entitled altogether, merely because they cannot immediately have all that they claim, and will eventually obtain? If I have taken a correct view of this case, the defendant stands in the position of the assignee of Mrs. Walton, and is tenant for life of a moiety of this property. It seems, from the case of *Ranald v. Russell* (a), that a tenant for life of an equity of redemption, having paid off and taken an assignment of the mortgage, may object to redemption during his life; but what is to prevent the plaintiffs other than Mrs. Walton, from redeeming an undivided moiety of the property, upon payment of a proportionate part of the mortgage money, and expecting redemption of the other moiety during the lifetime of Mrs. Walton? And this seems the proper place to introduce the mention of a point, which occurs in the construction of *M. Walton's* will, and which, having been totally omitted in the argument, may perhaps be advantageously spoken to by one counsel on each side before the case is ultimately disposed of. This is

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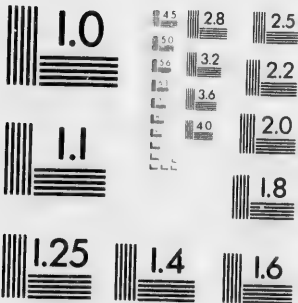
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with regard to the alternative in the devise to Mrs. Walton of a moiety of the lands, or of their value during her lifetime in lieu of her dower, whether the option belongs to her or to the children? I forbear to mention the opinion which I have formed upon this subject, until it has been spoken to as I have suggested, or until it is intimated by the respective counsel that they do not wish to do so; but I may mention that the practical effect of it seems important, as it may involve the question of whether the plaintiffs, other than Mrs. Walton, can redeem the entirety of the property during her lifetime, or only a moiety of it?

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Assuming that the redemption can be had to some extent in this suit, the defendant then contends that it can be only on the terms that he is not to be accountable for the rents, and that he is to be allowed the whole amount that he paid to Burr; or, at all events, the amount paid to the sheriff for the purchase of the property, and the full value of the improvements. For the greater part of these claims, I consider that no foundation or colour of title whatever exists. The rights of the plaintiffs cannot be affected by the mistake, in law, of the defendant, who must account for the rents in the usual manner, and cannot claim from the plaintiffs any part of the purchase money paid by him in consequence of such mistake. With regard to the amount paid to the sheriff, some colour of reason might, at first view, appear to exist for allowing it to the defendant, as the estate was *pro tanto* relieved; but, in my judgment, this claim is not in fact better founded than the other. The defendant, as a mere stranger, was not within any peculiarly favorable rule, such as was acted upon in the cases of *Pitt v. Pitt*, and *Neeson v. Clarkson*. The sole remaining question relates to the improvements. Upon this point the Court has a discretion, and it appears to me that it would not be an unsound exercise of it to allow to the defendant in this case the value of such im-

improvements as are a permanent of nature, suitable
 to the property, and beneficial to the mortgagor;
 upon which points enquiry must be directed. The
 old rule was to allow to the mortgagee the value of
 all substantial improvements on the premises; that
 the mortgagor seeking equity must do equity; and
 that it was reasonable that he should pay for improve-
 ments, of which he was to have the benefit. In more
 recent times, however, this rule has received much
 qualification, as it was found that the necessity of
 paying for improvements in addition to the principal
 interests and costs due upon the mortgage, frequently
 interposed a bar to the redemption of the property;
 and it appears to be established now, that the value
 of no improvements will be allowed, except such as
 has been made with the consent, expressed or implied,
 of the mortgagor. This must be understood to be a
 general rule, and open therefore to occasional excep-
 tion, such as may suit the justice of the case. In this
 instance the question is not subject to any peculiar
 rule, as the improvements were all made after the
 passing of the Chancery Act; but the circumstances
 are peculiar. The mortgagee supposed himself, rea-
 sonably enough, to be the absolute owner of the pro-
 perty, and was under no inducement therefore to
 obtain the sanction of the mortgagor, before he made
 the improvements in question; and I think it reason-
 able, therefore, notwithstanding the absence of such
 consent, as they were certainly not made with any
 design to shackle the equity of redemption, and as
 the mortgagor will derive great benefit from them,
 that the value of them should be allowed to the mort-
 gagee, so far as they are reasonable, beneficial, and
 suitable to the nature of the property. He must, at
 the same time, account according to the improved
 value. Two other points demand observation—one
 is the right to arrears of interest; the other, the ad-
 missibility of Mr. *Small's* evidence. With regard to
 the right to arrears of interest, our attention was

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directed to certain acts of parliament passed in England and this province, limiting the recovery of interest within certain times there specified. These acts respectively are in precisely the same terms, and must, I think, receive the same construction, although a much greater interval elapsed in this province between the passing of the former and latter acts passed here, than in England between the passing of the two imperial acts. The cases therefore, that were cited upon this point, appear to me to be governing authorities for this purpose; and it appears to me that the prior act, limiting the recovery of the arrears of interest on a mortgage to six years before the commencement of the suit, applied only where the mortgage contains no covenant for payment of the money. We think there is nothing in the objection, that if it does contain a covenant it ought to have been mentioned in the answer. The master must look into the deed in order to ascertain what interest he is to allow, and will be governed in taking the account by the result of his examination. In this case, the mortgagee has been in possession, and must be deemed to have applied the rents, first, in discharging interest, and then in sinking principal; and the first rents received must be considered as applied to the discharge of the arrears of interest due, so far as the mortgagee was entitled to recover them, whether for twenty years or six years, according as the mortgage-deed did, or did not, contain a covenant for the payment of the money. With respect to Mr. *Small's* evidence, I think that the subject of it did not in a degree partake of the nature of a privileged communication. The only material part of it—namely, Mrs. *Walton's* consent to and occurrence in, the sheriff's sale—was clearly intended by her to be made known to the plaintiffs in the action and the sheriff; and it necessarily followed, that the purchaser at that sale, or any one claiming under him, has a right to call for a discovery of it, as material to the sustentation of his title.

SPRAGGE, V. C.—I concur in thinking, with my brother *Esten*, that this is not a case in which redemption ought to be refused under the 11th section of the Chancery Act.

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In regard to the objection that the will of *Matthew Walton* is not sufficiently proved, I take the admission to amount to this, that it is sufficiently proved by the evidence of *Richard Woodsworth*, if the like evidence of all the subscribing witnesses would have been sufficient to have proved the will. The witness called is the one who proved the will by affidavit in the Surrogate Court. Upon being called in this suit, he does not recollect seeing the will executed; but he swears to his signature, and says he has no doubt from seeing his name as a witness that it was duly executed in his presence, and in the presence of the other witnesses (whose signatures he proves), in the presence of the testator and of each other; and he states that he is confirmed in his belief by seeing his affidavit proving the will in the Surrogate Court. The evidence of a subscribing witness to a deed, who speaks as to its execution not from recollection but from seeing his signature as attesting it, is admitted as sufficient proof. In each case the witness, by subscribing his name, certifies that the instrument (be it a deed or a will) was executed in his presence with the formalities expressed in the attesting clause. If upon his oath he swears he has no doubt that was done which he finds he certifies to have been done, the court, in the case of a deed, will consider it *proved* to have been done; and I do not see why the same rule should not apply in the case of a will. In the event of the death of subscribing witnesses the same rule applies to both, the Court assuming in such case that what they have certified to have been done was in fact done; the court gives faith to the witnesses' certificate. The court will not assume that there was not a due exe-

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cution of a will, with all necessary formalities, where witnesses are dead, even though some of the necessary formalities be omitted in the attestation clause. It has been held in England that, although the fact of the subscription of the witnesses in the presence of the testator is omitted in the attestation of a will, yet, if the witnesses be dead and their signatures proved in common form, it is evidence to be left to a jury of a compliance with all the necessary solemnities (a). From this it would appear (though the cases go further than is necessary to prove it) that no more stringent rule is applied in England in proving, from the signature of witnesses, the due execution of wills than the due execution of other instruments attested by the subscription of witnesses. I think that in this case the evidence, coupled with the admission, sufficiently proves the will.

Judgment.

The next question that arises is, whether the plaintiff *Isabella Walton* has by her conduct deprived herself of the right she might otherwise have with the other plaintiffs to redeem the premises in question. And, first, as to her rights under the will:—The will provides that she shall hold and enjoy all the real and personal property of the testator, for the support of herself and of his children until the eldest should come of age; that then the whole should be valued, and equally divided by the executrix and executors among all the children—the portions so allotted to be received and enjoyed by the children as they should come of age respectively; each child, upon coming of age, to have one of such portions; provided, nevertheless, that one half of each portion should be retained by the wife of the testator, or the value thereof paid to her in half-yearly payments; which payments should continue to be made during

(a) See *Hands v. James*, 1 Com. Rep. 531, 2 Eq. Ca. Abr. 16, 28; *Croft v. Pawlet*, 2 Str. 1109; *Brice v. Smith*, Willes 1; *Rancliffe v. Parkyns*, 6 Dow. 202.

her life; the payments to cease at her death; and such provision for her to be in lieu of dower.

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The widow of the testator had a life estate in a moiety of the property in question; but then arises the question whether the alternative provided by the will of retaining the half of each child's share, or the value thereof to be paid to her, was to be at her option or at the option of the child. If at her election, she ought not, I conceive, to be permitted to exercise her right of election now, so as to defeat the consequences of her own acts. If the election be in the children, they would, as it appears to me, have a right to redeem the whole property and pay her the value thereof, as provided by the will. This point has not been argued; and as a good deal appears to turn upon it, it would be well, I think, that it should be spoken to by counsel.

Upon the question whether or not the rights of the plaintiff *Isabella Walton* are affected by her acts, in relation to the sale by the sheriff of the property in question, I am of opinion that they are so affected.

It appears by the evidence that a writ of *fi. fa.* was in the hands of the sheriff against the goods of the testator; that *Isabella Walton*, in order to save the goods, entered into an arrangement with the creditors, in pursuance of which the writ against goods was returned *nulla bona*, and a *fi. fa.* against lands was issued, under which the lands in question were sold by the sheriff—these particular lands being pointed out to be sold first. She comes now into court to say that this sale was ineffectual to sell those lands, there being no legal estate but an equitable estate only, in those claiming under the testator's will; and, therefore, that she is entitled to redeem the lands which she had directed to be sold, and which were sold to satisfy the testator's debts, and by which proceeding the goods were preserved to

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her. By the course thus taken, not with her acquiescence merely, but at her instance, she was benefited, and the position of the creditors was changed. The goods which she desired to preserve were preserved—the creditors had not them out of which to satisfy their debts; or, if there were other lands (as may be inferred from the language of Mr. *Small*), that the property in question was pointed out by her as the property which she wished to be sold *first*. The creditors might, instead of selling the lands in question, have sold such other lands. What may have been the value of the goods, or of any real estate of the testator, other than that sold does not appear. Even the land in question was not beyond the reach of the judgment creditors, who might have redeemed the mortgage and have foreclosed the present plaintiffs, unless they paid off the judgment debts as well as the mortgage.

Judgment.

The course of *Isabella Walton* was that of a person desirous of preserving her goods, and selecting from among her lands that which she considered might probably be sold at the least sacrifice. In preserving the goods and directing real property to be sold, she acted in contravention of her duty as executrix, though probably with a view to the comfort and interest of the children as well as herself. Coming now to redeem, she seeks to invalidate a sale made at her own instance. By directing the sale, she assumed and even assented that there was a saleable interest. The necessary consequence of such a sale was to denude her of her interest in that property. In *Vickard v. Sears* (a), the conduct of the party was merely lying by, not asserting property in the goods about to be sold while consulting about them, and thereby leading to the belief that he had no claim. And Lord *Denman* said “the rule of law is clear,

(a) 6 Ad. & Ell. 474.

that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

I do not assume that Mrs. *Walton* in acting as she did, wilfully misled any one; she probably thought, as it is likely that all other parties concerned did, that the estate of those entitled under the will of the testator was saleable under execution; but that, I conceive, can make no difference—her ignorance in the matter cannot affect the rights of others. Upon this, *Hunsden v. Cheyney* (b), is in point. If Mrs. *Walton* had been sole devisee under the will of the testator, and in order to satisfy debts for which the testator's property was liable, selected one piece of land, and directed that piece of land to be sold first—she, not mistaking her interest in the land, but thinking that interest saleable—could she afterwards be admitted to say to a purchaser under that sale that what she had directed to be sold was not in law liable to sale, and thus avoid the sale? I think there can be no doubt that she would be estopped from saying this; yet she in effect says it in coming now to redeem. I think that, as to any portion of the land in which she took a life estate under the will, there can be no redemption in her life-time.

1851.

Walton
v.
Hernard.

Judgment.

In looking into this point, it became necessary to consider whether the evidence as to Mrs. *Walton's* conduct in the matter was admissible. It appears by the admissions, that in conducting matters to a sale on the execution referred to, Mr. *Small* was acting as attorney for both plaintiffs and defendants. The facts of which Mr. *Small* has given evidence were not confidentially disclosed to him by Mrs. *Walton*, but were thus communicated to him for the

(b) 2 Vern, 150.

1851. very purpose of being communicated to others, as
 Walton v. Bernard. was the cause in *Griffith v. Davis* (a), where the communication was held to be not privileged. The cases of *Perry v. Smith* (b), *Weeks v. Argent* (c), and *Bough v. Cradocke* (d), are also in point to shew that the matters of which Mr. Small has given evidence were not privileged; and I think that they would not have been privileged even if Mr. Small had been attorney for Mrs. Walton only.

Judgment. It is urged by counsel for the plaintiffs, that Mrs. Walton is at all events entitled to her dower, and may have her dower in lieu of the provision made for her by her husband's will, and that she has not elected to take under the will. I think, however, that by coming here to redeem as a devisee under the will, she has made her election. She claims here in that character, not as dowress; and cannot, I apprehend, in this suit at all events, repudiate the character in which she has come into court, and seek relief in another. It is not that she combines two titles, but is put to her election; and the taking of one negatives the existence of the other. It may be doubted, too, whether she must not be taken to have elected when she gave directions for the sale of the property in question.

If the plaintiff, *Isabella Walton*, has by her conduct disentitled herself to redeem, then, it is contended by defendant's counsel, that there can be no redemption in this suit, as the suit is improperly constituted in joining as plaintiff one not entitled to redeem with others who are entitled. This objection, I think, cannot prevail. In *Morley v. Lord Hawke* (e), a tenant for life of a fund, with remainder to certain members of his family, who had succeeded by collusion with one of the trustees in

(a) 5 B. & Ad. 502. (b) 9 M. & W. 682. (c) 16 M. & W. 817.
 (d) 1 Moo. & Rob. 182. (e) Cited 2 Y. & J. 520.

getting into his hands part of the principal money, was made a co-plaintiff with the other trustees. It was objected at the hearing on the part of the innocent trustee, that the suit was improperly framed, because some of the plaintiffs who had a right to relief had joined with them that *cestui qui trust* who was not entitled to relief, having been a party to the breach of trust; but Sir Wm. Grant said, that though there might be *cestuis qui trust*, some of whom were innocent and others of whom had improperly joined in committing a breach of trust, and both were joined as plaintiffs in the same suit, still those *cestuis qui trust* who had not joined in the breach of trust were entitled to a decree. In *Williamson v. Parry* (a), the bill was by a wife and three children against trustees. She and one of the children had given a bond of indemnity to the defendants, and therefore were not proper parties. The objection was taken at the hearing and overruled. The cases appear to decide that an objection taken at the hearing for misjoinder of plaintiffs, even if there be misjoinder, is not necessarily fatal; but that if the Court can make such a decree as it would have made if the party misjoined had not been made a party or had been made a defendant, it will make such a decree. Besides, here the matter which disentitles *Isabella Walton* to relief (if she is disentitled) is matter of defence; and if the other plaintiffs had not joined her as a co-plaintiff, they must have stated those matters in their bill, or it would have been objectionable for want of parties.

Taking it then that the plaintiffs, other than *Isabella Walton*, are entitled to redeem a moiety of the premises in question, their right to redeem the other moiety, not accruing till the determination of the life estate of *Isabella Walton*, the question is, upon what terms they should be allowed to redeem.

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Judgment.

(a) 4 Russ. 272.

1851.

Walton
v.
Bernard.

For the plaintiffs, it is contended that they are not bound to pay more than six years' arrears of interest, and that the defendant is not entitled to be allowed for improvements. The defendant, on the other hand, claims all arrears of interest, the cost of improvements the amount paid for the purchase of the premises, at sheriff's sale, and the amount paid by him for the purchase of the premises from *Rowland Burr*, all with interest--the latter indeed must include everything but the improvements made by himself. With regard to the latter, it is evident that it is compounded in part of the increased value of the land. It is the plaintiffs' land as devisees of the mortgagor; and to allow the defendant what he demands in that respect, would be allowing to one man the improvement in value in another's property, and that at the expense of the real owner. The claim for the amount brought by the land at sheriff's sale stands upon a less objectionable footing, inasmuch as the same parties are entitled to all the real and personal estate, subject of course to the debts of the testator, and the estate has been relieved *pro tanto* from such liability. This claim is founded upon the equitable maxim, that he that comes into equity must do equity; and if it were open to the Court to impose upon plaintiffs coming into equity whatever terms the Court might think it morally right in each particular case to impose, this claim might not be inadmissible; but it is quite clear that the rule rests upon a much more certain and definite principle. In *Neesom v. Clarkson* (a), Sir James Wigram states it as a general rule, that unless the equity which the defendant derives from the plaintiff is one which the defendant might enforce by bill, it is not a term which the Court has a right to impose on the plaintiff. In *Sober v. Kemp* (b), the same learned judge says, "It has always appeared to me, that the terms on which a

Judgment.

(a) 4 Hare, 97. (b) 6 Hare, 160.

mortgagor or those claiming under him, are entitled to redeem, must be the same whether they are to be ascertained in a suit for redemption or for foreclosure. It is truly said that a plaintiff seeking equity must do equity; but in determining what is equity, the question is, what are the duties or the liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant on the record." And again, in *Hanson v. Keating* (a), he says, "And my opinion is, that the Court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that condition upon the record, but can only require him to give the defendant that which by the law of the Court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit. A party, in short, does not by becoming plaintiff in equity give up any of his rights, or subject those rights to the arbitrary disposition of the Court. He submits only to give the defendant his rights in respect of the subject matter of the suit, on condition of the plaintiff obtaining his own." The only question then is, whether if this defendant were plaintiff in a suit to foreclose, he would, as against the *Waltons*, other than *Isabella Walton*, be entitled to a decree of foreclosure, unless they recouped him what he paid for the purchase of the unsaleable equity of redemption, as well as paid the mortgage money and interest. No authority has been cited that would warrant this; and I think that such a position would be found untenable. If however, any compromise should take place between the parties (and I think it a very proper matter for compromise), with a view to immediate redemption of the whole premises, without waiting for the death of *Isabella Walton*, I think it would be just that *Bernard* should be reimbursed that amount, with interest.

1851.

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Bernard.

Judgment.

(a) 4 Hare, 6,

1851. The parties to such a compromise would be, the party who made the payment, and all those who were benefited by the payment.

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I agree with my learned brother that the plaintiffs, other than *Isabella Walton*, redeeming a moiety, should do so upon paying a moiety of the mortgage money and interest; and I concur in the view he has taken in regard to the objection that the defendant is entitled to only six years' arrears of interest.

Judgment.

With regard to the defendant's claim to be allowed for improvements made upon the premises in question, there can be no reason to believe but that he considered that he had acquired an absolute title to those premises; that he dealt with them as his own, and in improving them honestly thought that he was improving his own property, as was the case in respect to the improvements referred to in *Neesom v. Clarkson*. At the time too that these improvements were made, the opinion was very generally entertained that an equity of redemption was saleable under execution at common law; and the words of the statute 5 Geo. II. c. 7, certainly give much color to such an opinion. Looking then at the circumstances under which *Rowland Burr* purchased from Mr. *Blake*, and the defendant *Bernard* from *Burr*—at the circumstances of the *Walton* family having quitted Canada apparently for ever, and with one exception (that of the eldest son) residing among the Mormons in a distant part of the United States; the eldest son a mariner on the lakes, occasionally visiting Toronto yet making no claim, with the opportunity of knowing, if he did not actually know of the improvements in progress,—it would be most inequitable to apply to improvements made under such circumstances rules, which, though just as applied to parties filling the relative character of mortgagor and mortgagee under ordinary circum-

stances, would operate most unjustly in such a case as this. There was here, to all appearance, such an acquiescence in the sale, and such an entire abandonment of the property, as naturally to lead the defendant to the conclusion that the *Waltons* as well as himself looked upon the property as having passed by the sheriff's sale. Under these circumstances, he makes improvements of a permanent nature, enclosing the premises in a fence and erecting two or three houses upon them. So far as the evidence goes, he does not appear to have done otherwise than as a prudent owner would have done. The property, in the immediate neighbourhood of an improving city, would have lain waste if the defendant had left it as he found it. He turned it to account as owners of property in the neighbourhood turned their property to account. In his dealing with the property as he did under the circumstances, I think the *Waltons* have nothing to complain of. I say this however without intending to decide that the defendant is to be allowed for the improvements made upon this property. I intend only to express my views as to improvements of such a nature as these may probably be, made under the circumstances under which these have been made. The evidence does not shew the cost or value of these improvements, nor whether they were suitable to the place in which they were erected. From the evidence I should think they probably were so; but it must, I conceive, be for the Master to say, with further evidence before him, and with a knowledge of the general views as to the improvements entertained by the Court, what ought to be allowed for improvements made upon the premises in question.

1851.

Walton
v.
Bernard.

Judgment.

1851.

WILSON V. TOWN COUNCIL OF THE TOWN OF
PORT HOPE.*Injunction—Provincial Statute 12 Victoria, ch. 81.*

August 22 & Sept. 9. Where the Town Council of one of the towns mentioned in the Schedule to the provincial statute 12 Victoria, chapter 81 were about proceeding to open a street without having first obtained the permission required by the statute of certain parties owning houses on the land over which the intended street would pass—the Court granted an injunction to restrain the opening of such intended street, upon a bill filed by a party whose land lay on the line of the intended street, although no house stood upon the plaintiff's land, and his premises were not within the exception contained in the proviso to the 60th clause of the act.

Statement. This was a motion upon notice, for an injunction restraining the defendants, their officers, &c., from interfering, &c. with the premises of the plaintiffs, situate in the town of Port Hope on the ground that no agreement had been entered into by the plaintiffs with the defendants for permission to run a street through the premises of the plaintiffs: the plaintiffs insisting that they had a right to object to the opening of such street, under the provisions of the 60th clause of the provincial statute 12 Victoria, chap. 81—the proviso to which is as follows:—"Provided always nevertheless, that no such new, widened, altered, changed or diverted highway, road, street, sidewalk, crossing, alley, lane, bridge or other communication, shall be laid out so as to run through or encroach upon any dwelling-house, barn, stable or out-house, or any orchard, garden, yard, or pleasure ground, without the consent in writing of the owner thereof."

Affidavits setting forth the facts were filed by both parties—the contents of which are sufficiently stated in the judgment.

Argument. Mr. Brough for the plaintiffs.

The following cases were cited as bearing on the

question of jurisdiction of the court to interfere by injunction, under the circumstances of this case, notwithstanding that the Municipal Corporations Act, 12 Vic. ch. 81, gives any person who is aggrieved by a by-law, illegal in the whole or in part, the right to apply to the courts of common law to quash such by-law—*Coates v. The Clarence Railway Company*, (a); *Sheriff v. Coates*, (b); *The Attorney General v. Aspinall*, (c); *The Attorney General ex relatione The Corporation of Leeds v. Wilson*, (d); *The Attorney-General v. The Corporation of Poole* (e); *The Attorney General v. The Mayor of Liverpool*, (f); *The Attorney General v. The Corporation of Norwich*, (g); *Morris v. Duke of Norfolk*, (h); *Frewin v. Lewis*, (i); *The Sutton Harbor Company v. Hitchins*, (j); *The North-Western Railroad Company v. Smith*, (k): On the other points of the case *Blackmore v. The Glamorganshire Canal Company*, (l); *Salmon v. Randall*, (m); *Rex v. The Eastern Counties Railway Company*, (n); *Rex v. Cumberworth*, (o); were referred to.

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Wilson
v.
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Judgment.

Mr. Vankoughnet, Q. C. for the defendants.

THE CHANCELLOR.—The bill in this cause, which was filed on the eleventh day of August last past, states in substance this case:—The complainants, *Nathaniel Wilson* and *Susan Frances*, his wife, are seized in their demesne as of fee, in right of *Susan Frances*, of a certain parcel of land in the town of Port Hope, fronting on Walton street, and bounded on the westerly side, so far as I understand the plan, by Maitland street. Upon this property there stood formerly two dwelling houses, which were destroyed by fire in the month of July 1850. These buildings

(a) 1 R. & My. 181. (b) 1 R. & My. 159. (c) 2 M. & C. 613, 628, 633. (d) 9 Sim. 30, 49; S. C. 1 Cr. & P. 1. (e) 2 Keen 90; S. C. 4 M. & C. 22. (f) 1 M. & C. 171. (g) 1 Keen 700. (h) 9 Sim. 472. (i) 9 Sim. 67; S. C. 4 M. & C. 249. (j) 15 Jurist 70. —(k) 1 McN. & G. 220. (l) 1 M. & K. 162. (m) 3 M. & C. 439. —(n) 10 Ad. & E. 531. (o) 3 B. & Ad. 108.

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were constructed of wood, and rested, *in part of their extent*, as the affidavits shew, upon stone foundations, of the height of seven feet and upwards. The bill alleges that the *entire* structure rested upon stone walls, and these are said to be still standing: But the affidavits shew, I think, that one of the houses rested, either altogether, or in great part, upon wooden posts; and that one of the walls upon which the other was placed has been entirely destroyed by the fire in question, whilst the others are injured to an extent which renders them entirely unfit for building purposes. From the occurrence of the fire until the month of June, or thereabouts, in the following year, this plot of ground remained waste, uninclosed and unoccupied. But after the defendants had given notice of their intention to open Ontario street, the complainants caused some building materials to be placed upon the land in question, and certain other work, of inconsiderable amount, to be performed, which I need not specify more particularly, because the fact appears to me to be immaterial to the determination of the question before us. On the 16th day of June last the defendants passed a by-law, by which they laid out a new street in the town of Port Hope, to be called Ontario street, leading from Walton street to the Rice Lake and Lake Ontario road. Its easterly limit is described in that instrument as commencing at the point where the northerly limit of Walton street is intersected by the easterly limit of Maitland street, and as running thence in a course north 47 degrees 45 minutes east to a post planted on the east side of the Rice lake and lake Ontario road. And the street itself, which is delineated as 66 feet wide, to the west of that line, occupies, at its intersection with Walton street, the entire space formerly known as Maitland street; and further encroaches on the plaintiffs land to the extent of about forty-two feet. The bill alleges, that, in its course to the Rice Lake road, it also encroaches upon

dwelling houses, out houses, yards and gardens of several other persons, who have not consented, and, as it is alleged, are determined not to consent to its construction.

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On the 6th of August last past, the defendants, by public advertisement, invited tenders for the construction of this work, to be sent to their office on or before the 13th of the same month, and thereupon the complainants, on the eighth of August, applied, *ex parte*, for an injunction, upon affidavits of the truth of the facts I have just stated. That application was refused, but gave the plaintiffs permission to give notice of a motion; and in pursuance of that leave, notice of the present motion was served on the 11th of August.

The bill, in effect, prays, and the motion asks, that the defendants be restrained from taking possession of or interfering with the property of the plaintiffs Judgment. for the purpose of the proposed street.

Upon the argument, the learned counsel for the plaintiffs, rested their case upon three distinct grounds. He contended in the first place, that, upon the proper construction of the statute 12th Vic., chap. 81, the premises in question should be regarded as accepted by the proviso to the 60th clause, notwithstanding the fire of July, 1850. He argued, that, for this purpose, the dwelling houses which had existed prior to that period should be treated as still in existence, and that, as the proposed street, in that view, would clearly be an unwarranted encroachment upon "the dwelling houses" of the complainants, and would be restrained, this Court, in the present case, undistinguishable in principle, as it was contended, ought to restrain the defendants from so illegal an abuse of the powers vested in them by their act of incorporation. He contended in the second place, that, although the complainants' land should not be

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regarded as coming within the proviso to the 60th section, still, inasmuch as the proposed street did encroach upon the dwelling houses of other persons, who had not given their consent in writing to its construction, either the by-law was illegal and void, or, at all events, the completion of the work would be so; and that in either view, the complainants were entitled to the injunction of this Court to restrain what must be regarded as either an illegal, or at least, a useless and oppressive exercise of the powers vested in the defendants. He contended, lastly, that he was, for the same reasons, entitled to an injunction to restrain the defendants from expending the public monies in the construction of any portion of a work, either altogether illegal, or which must under the circumstances prove to be incapable of execution.

Judgment.

Upon the construction of the act, no case was cited. The question was treated by the learned counsel on both sides as unaffected by decision. Upon consideration, we are of opinion that land so circumstanced does not come within the proviso to the 60th clause. The public interest obviously requires that power to interfere with the rights of property, for the purposes contemplated by the 60th section, should be vested somewhere; otherwise it would be in the power of individual members of the community to put a stop to the most important public improvements. Accordingly a very extensive power has been confided to these defendants, and other similar corporations, by the legislature. But this power is not unlimited. The legislature was of opinion that the rights of private property should under certain circumstances, be respected; and amongst the exceptions enumerated in the proviso to the 60th clause it is declared that no street should be laid out so as to encroach upon any dwelling house without the consent in writing of the owner thereof. Now,

whether we are to regard these exemptions as introduced because of the capital expended in the excepted cases, or out of respect to the wish of the proprietor and the rights of property, where land had been applied to certain specified purposes, whatever may have been the principle, it seems to us that this case falls neither within the letter nor the spirit of the act. That the case does not come within the letter, is almost too obvious for comment. This street certainly cannot be said to encroach, in a literal sense, upon the "dwelling house" of the complainants. We have not to deal with a case of partial destruction, or with a case of immediate restoration after total destruction. Here the structure has been so completely destroyed as to be quite incapable of repair. It is sworn that no portion of the foundation is capable of being restored, and it has remained waste and unoccupied for a period of ten months before the enactment of the by-law complained of.

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Judgment.

But, if not within the letter, is the case within the spirit of the exception? We think not. Whatever capital may have been expended upon this land, to whatever purpose it may have been applied by the proprietor previous to the fire of July, 1850, its whole condition was changed by that event. The capital invested was thereby annihilated, and this property then ceased to be applied to the purposes contemplated by the act. An intention to *rebuild* cannot have any greater effect, as it seems to us, than an intention to *build*, and that would be plainly inoperative. The legislature meant to limit the power of these municipal corporations where there had been an actual application of property to the purposes specified, not where an intention to apply only had existed. But the reasoning of the learned counsel for the plaintiffs seems to us, in effect, to negative that proposition, and is in our opinion opposed to the letter and spirit of the statute.

1851. The argument in support of the second ground
proceeds upon the assumption that this street is laid
out by the by-law so as to enroach upon the property of certain persons, not parties to this suit, in a manner prohibited by the statute. This assumed fact does not rest upon the evidence of the plaintiffs merely, but is confirmed by the affidavits of two of the persons affected, *John Hutton* and *Frederick Hoover*. *Hutton* swears that "he is the owner in fee simple of a town lot in Port Hope, through which the said intended new street would pass; that a dwelling house, out houses and garden are upon the said lot, that the said street would take away nearly half the said dwelling house, all the shed and a great part of the garden." *Hoover* swears that he is the lessee of certain premises which he uses as a warehouse, which would be entirely taken away by the new street.

Judgment. Now it appears to us that this evidence has not been satisfactorily met by the defendants. Two witnesses, it is true, *Mr. Quinlan* and *Mr. Grant*, swear in very general, and somewhat equivocal terms, that the consent of all necessary parties has been obtained. *Mr. Quinlan*, who was employed by the defendants for the purpose of obtaining the consent of those interested, swears "that the consent of all parties, whose consent it was necessary in law, in the belief of this deponent, to obtain to the said line of road had been given thereto." It is hardly necessary to observe that an allegation so framed can have no weight, except, perhaps, as leading to the inference that the consent of all parties, actually necessary, had not been obtained. *Mr. Quinlan*, instead of stating the facts, from which the Court could draw the conclusion of the law, states that the consent of all whose consent was necessary "in law, in his belief," had been obtained. How can the Court discover his belief on this matter of law, or determine its correct-

ness? Mr. *Grant's* affidavit, also, is very general; and both fail to shew that those parties had given their consent "in writing," which is required by the statute. But it becomes unnecessary to scan these affidavits very accurately, because Mr. *Smith*, one of the defendants, no doubt well acquainted with the facts, has made an affidavit, produced by the defendants, which, as it seems to us, quite sustains the plaintiffs' case in this respect. He swears "that it was not, and is not the intention of the said Town Council to remove any buildings on the line of the said street without the consent, in writing, of the owners thereof; that several of such owners have already agreed upon the terms upon which they are willing to permit the road to pass through their premises, and *deponent has no doubt that terms can and will be made with those who have not already agreed.*" This evidence, produced by the defendants, seems to us conclusive upon this point. It authorizes us to say, that it has been established, for the purpose of this motion, that the Town Council passed this by-law, and are proceeding with this work, without having obtained the consent, in writing, prescribed by the statute.

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But, passing from those general statements to the particular instances specified by the plaintiffs: The affidavit of *Hoover* has not been contradicted at all. With respect to *Hatton's* affidavit, Mr. *Grant* describes a parcel of land, which belongs, he says, to Mr. *Hatton*. He states, that the only building upon the plot of ground so described, is a dwelling-house, which he alleges to be off the line of the proposed street, which will not, he affirms, encroach upon any house, out-house, yard or garden appertaining to the land in question. Now, assuming that the parties are speaking of the same premises, their statements are perfectly irreconcilable. Mr. *Hatton* speaks of a parcel of land, with respect to which he swears that

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the projected street would occupy the site, not only of a dwelling-house, but of an out-house, and also a great portion of a garden ; while Mr. *Grant* describes a tenement, of which none of these facts can be truly affirmed. But what foundation is there for the conclusion that these gentlemen are speaking of the same locality ? It is nowhere asserted ; and to assume it, would be to charge one or both of the witnesses with a gross mis-statement of a plain matter of fact, respecting which there can be little room for mistake—a conclusion, which would be, in our opinion, quite unwarranted. We are of opinion, therefore, that the true result of the evidence is, that the defendants have not obtained, and probably may not be able to obtain, the consent prescribed by the statute.

Judgment.

Assuming then, that the street described in this by-law encroaches upon certain properties with respect to which the legislature has said that the consent in writing of the proprietors must be obtained, and assuming this by-law to have been passed before the defendants had obtained such consent, we are of opinion that it is, for that reason, illegal and void.

It is argued however, that the proviso to the 60th clause does not render the by-law invalid, in the absence of previous consent, where this is prescribed ; but only precludes the corporation from acting under it, so as to encroach, in fact, upon exempted property. Such is not, in our opinion, the true construction of the act. The 60th clause defines what these municipal bodies may *enact*, not what they may *do* under such enactment. It provides that they *may pass by-laws* for the opening, widening, &c., of streets, &c. Then comes the proviso, "Provided that no such new, &c., street, &c., shall be laid out so as to run through or encroach upon any dwelling-house, &c., without the consent in writing of the owner thereof." That is to say, provided that no such street

shall be laid out by any by-law, or provided that no by-law shall be passed laying out any street so as to encroach, &c., without the consent of the owner. The clause itself confers upon these municipal bodies certain legislative powers; and the object of the proviso is, not to define what may be *done* under these acts, but to limit the legislative power—to provide that such laws should be invalid, under certain circumstances, unless consented to by the parties specified in the proviso.

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That this is the true construction of the clause, may be shewn, we think, incontrovertibly, from an examination of the provisions of the 155th section. The course to be pursued in order to quash illegal by-laws is there prescribed; and it is then enacted that no action shall be brought for anything authorized to be done under any such by-law, unless such by-law shall have been quashed one month previous to such action. Now, upon the construction contended Judgment. for—assuming such a by-law as we have been speaking of to be legal without previous consent—assuming the proviso not to have the effect of invalidating the law, but only of prohibiting certain specific acts under it—upon such a construction, parties injuriously affected would be altogether without remedy. The law being legal in its inception, upon the hypothesis, could not be then quashed; and it is not easy to perceive how a law, legal in its inception, could be invalidated by an illegal course of proceeding under it. The law would still remain legal. It could not be quashed; and therefore under the 155th section, no action could be brought for anything done under it, which would be absurd.

But, though our opinion upon the construction of the act should be erroneous, still, the defendants, as it seems to us, are plainly acting illegally. Not only have they surveyed this road, that is, "laid it out,"

1851. in the sense in which that term is understood by the learned counsel for the defendants, but they have actually commenced the construction of the work, a course, as it seems to us, plainly unjustifiable.

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It is hardly necessary to allude to the last clause of the by-law, which provides that the Town Council will not encroach upon any dwelling house, &c., without first obtaining the consent of the proprietor. If the by-law be illegal, because the proprietors had not given their consent in writing previous to its enactment; this clause, which provides that the corporation will not act under it until that consent shall have been obtained, cannot, obviously, have the effect of rendering it valid. On the other hand, if this by-law be valid, and if the proviso to the 60th clause of the act only prohibits the corporation from proceeding to "lay out" the street, then they have proceeded to lay it out; and this clause, which says that they shall not do what they have in fact done, cannot have the effect of rendering their conduct legal. In either view, the proceedings of these defendants are, as it seems to us, plainly illegal, and the complainants have made out a clear case for the relief which they ask.

The jurisdiction of this court was not denied; but it was argued, upon grounds of expediency, that the contemplated interference would be of injurious consequence, retarding, possibly altogether defeating, improvements, confided by the Legislature to these municipal bodies, and in which the public have a deep interest. We cannot accede to that argument. If there be a clearly settled principle upon which these complainants are entitled to relief, it is our plain duty to apply that principle to every case coming properly within its operation.

But, viewed in the light in which the case was

presented by the learned counsel for the defendants, we are far from agreeing to the soundness of his conclusions. It was in answer to an argument of the same kind that Lord Cottenham observed on a recent occasion (a)—“It would have been a very inconvenient thing, that those whose duty it was to administer equity in this court, when these questions first arose, should have repudiated the jurisdiction, and have left the parties to their legal remedies. This court, however, thought it right in such cases to exercise a very proper and wise jurisdiction, and one clearly within its power. It was expedient that such jurisdiction should be exercised over those interested under the various acts relating to railways, so as to keep all parties within the powers which the acts confer.” And so I say here—It is expedient that this jurisdiction should be exercised so as to keep all parties within the powers which the acts confer. These municipal bodies are armed with very extensive powers. It is expedient that they should be permitted to exercise those powers without control? To borrow the language of the same learned judge in a case very analogous to the present—(b) “The question of jurisdiction was raised, and it was argued by those who supported the demurrers that this court had no jurisdiction. Now I apprehend that the limits within which the court interferes with the acts of a body of public functionaries, constituted like the Poor Law Commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere; the court will not interfere to see whether any alteration or regulation which they may direct is good or bad. *But if they are departing from that power which the law*

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(a) The London and North Western Railway Co. v. Smith, 1 McN. & G. 220; Coates v. Clarence R. R. Co., 1 R. & M. 181.

(b) Frewin v. Lewis; 4 M. & C., 225.

1851. has vested in them—if they are assuming to themselves a power over property which the law does not give them, the court no longer considers them as acting under their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. That distinction, which is very obvious, sufficiently explains all the grounds on which this court ever interferes with the acts of bodies constituted as these commissioners are. Many cases have come judicially before me, in which I have been called upon to act upon this principle, more especially, in the instance of railway companies, canal companies, and other bodies incorporated by acts of Parliament; as to which, while the court avoids interfering with that which they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction.”

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The jurisdiction, then, being clear, and the principles upon which it is exercised well defined, let us consider the circumstances of this case. These defendants have been invested by the Legislature with very extensive powers—powers useful, no doubt, perhaps necessary for the public welfare, still extensive, and liable in their operation to bear severely, and at times harshly, upon the rights of individuals. But the power thus conferred is not unlimited power. Private rights and private property have been to a great extent disregarded; but that has only been where, and to the extent that, such sacrifice is required by the public interest; and within certain specified limits the Legislature have thought that private rights and private property ought to be respected, no matter

how the public interest might be prejudiced thereby. Now, if this by-law be illegal, or if the proceedings of these defendants under it be illegal, are they not departing from the power which the law has vested in them? Are they not assuming to themselves power over property which the law does not give them? Under pretence of an authority which the law gives them, to a certain extent, have they not gone beyond the line of their authority? And is it not the plain duty of this court to restrain them within the powers conferred upon them by their act of incorporation.

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But beyond that point, there is another principle which greatly strengthens the equitable case presented by this bill. We have said that the proper conclusion from this evidence, in our opinion is, that the street laid out by this by-law encroaches upon the properties of certain individuals whose consent is necessary, and who, not only have not consented, but have declared their intention not to consent to its construction. It follows, therefore, that these defendants are about to take possession of the land of these complainants, for the purpose of an improvement, which, under existing circumstances, they cannot complete. They are about to infringe the private rights of these parties without having the means of effecting the public good, which is the only warrant or justification for such interference. Would not the occupation of the complainants' property under such circumstances be a mere wanton infringement of private rights? and is it not the plain duty of this court to protect them from being subjected unnecessarily and uselessly, if not illegally, to such a sacrifice? This principle was acted on by Lord *Eldon* in *Agar v. Regent's Canal Co. (a)*, and has been since sanctioned, to this extent at least, by the highest authority.

(a.) Cited in *Salmon v. Randall*; 3 M. & C., 444

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During the progress of the argument, it occurred to me to doubt whether the principles to which I have referred were properly applicable to the present case. These defendants, having legislative powers, and having therefore authority to pass at any moment a by-law laying out a street, coincident with the present, but extending no further than the extremity of the complainants' land, it occurred to me that it might be for that reason inexpedient to restrain by injunction an act, which seemed, in that view, capable of being at any instant rendered legal. Subsequent reflection has convinced me that this doubt was unfounded. The defendants have not an unlimited power of legislation. They are bound to give notice of their intention to introduce such a by-law; and they are required to allow all parties interested an opportunity of being heard in opposition to it. Besides, a street leading from Walton street to the Rice Lake road, is something very different from a street leading in the same direction for the distance of a few feet only; and those who voted for the former improvement, might, very reasonably, take a totally different view as to the latter. But the conclusive answer to this argument is, that no such by-law has been passed. The by-law actually passed has laid out a street leading from Walton street to the Rice Lake road. The junction of those thoroughfares was the public advantage which the Town Council desired to accomplish; and we are inclined to think from the affidavits, that such a street would be a public improvement of great importance. But, if the completion of this work as a whole, be, under existing circumstances, impossible—and that, we have said, is in our opinion the fair result of the evidence—and if, consequently, the public good contemplated by the by-law—the equivalent upon consideration of which alone the legislature sanctioned the sacrifice of private rights—be unattainable, would not the occupation of the complainants' land, under such

circumstances, degenerate into a mere arbitrary infringement of the rights of property? Have not the complainants a clear right to the injunction of this court, for the purpose of restraining the Town Council of Port Hope within the powers conferred by the act under which they exist? And would it not be extremely inconvenient, in the language of Lord *Cottenham*, were those whose duty it is to administer justice in this court to repudiate this jurisdiction, and leave parties complaining of such an infringement of their rights to the very imperfect remedy afforded by the common law process? (a).

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As to the delay which has taken place, we should feel very reluctant, certainly, to weaken the authority of any decided case on the subject of delay. But, upon consideration, we are of opinion that nothing has occurred in this case which ought to debar the complainants of the relief which they ask. The Town Council have themselves originated this litigation by their unauthorized proceedings. When they gave notice of their intention to pass this by-law, and when they actually enacted it, the complainants were, in our opinion, warranted in assuming that they neither intended to pass the by-law, nor to take any action under it, without having pursued the course prescribed by the act of Parliament. They, certainly, were not bound to attend for the mere purpose of protesting against a violation of the law. Besides, the law itself was calculated to mislead. It held out a sort of promise that it would not be acted upon until the necessary consent should have been obtained. And the moment the defendants evinced their intention to commence active operations, and before any consent had been entered into, the complainants filed their bill. The steps actually

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(a) *Sheriff v. Coates*. 1 R. & M. 159; *Attorney-General v. Mayor of Liverpool*, 1 M. & C. 171.

1851. taken by the Town Council were quite sufficient to warrant the application; and there is no principle or authority upon which we could hold that they have come too late.

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It is unnecessary for us to consider whether, irrespective of the equity growing out of the infringement of private rights, we have jurisdiction, as was contended by the learned counsel for the complainants, to restrain the Town Council from expending the public funds upon a work which cannot under existing circumstances be completed. Neither need we determine whether, if such equity exist, it could be enforced upon a record framed like the present. Those questions do not arise, because no such case has been made, and no such relief is either prayed by the bill or asked by the motion. The injunction, therefore, must be confined to restraining the defendants from interfering with the property of the complainants.

NEIL v. THE BANK OF UPPER CANADA.

Practice—Injunction—Mortgage.

August 22. A mortgage had been created by an absolute deed of conveyance, with a bond of defeasance; a judgment was afterwards obtained against the mortgagee, and an execution sued out against his lands; the Sheriff, under the writ so issued, had advertised, and was about to sell the mortgage property: upon a bill filed, against the judgment creditor and the mortgagee, setting forth these facts, which were admitted by the defendants, the Court granted a special injunction restraining further proceedings under the writ.

Where the common injunction is obtained to stay execution, it will have the effect of staying a sale under the execution, notwithstanding the writ may be in the hands of the Sheriff at the time the injunction issues.

Statement. The bill in this case was filed by Robert Neil and William Neil, against The Bank of Upper Canada and Robert Howard, setting forth, in detail, the facts

mentioned in the judgment of the court, and praying for an injunction to stay proceedings at law. Default having been made in answering, the plaintiffs obtained the common injunction, and now moved upon the answer put in by *The Bank of Upper Canada* to extend the common injunction already obtained, so as to stay the sale of the property in question under a writ of *venditioni exponas* issued against the lands of the defendant *Howard*; or that a special injunction restraining such sale might be issued.

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Statement.

Mr. *McDonald*, for the plaintiffs, referred to *Strong v. Lewis*, (a) to show that all that a purchaser could acquire under the sheriff's deed would be the estate of *Howard*, which was only that of a mortgagee, if, by the recent statute, the interest of a mortgagee was saleable under execution; but as the writ purported to be against the lands of *Howard*, the plaintiffs did not deem it advisable to remain quiet and allow their property to be sold; for whatever might be the interest which would be acquired, no doubt the effect of such a sale would be to raise a cloud upon the title, to prevent which, the plaintiffs had a right to come to this court in the first instance.

Argument.

Mr. *Crickmore*, for *The Bank of Upper Canada*, relied upon the fact of the bank having given credit to *Howard* under the belief that he was owner of the property in fee, and had obtained and registered their judgment without any notice of the claim of the plaintiffs, and submitted that the Bank was in the position of a purchaser for valuable consideration without notice: cited *Harrison v. Baby*, (b) and *Walker v. City of Toronto*. (c)

THE CHANCELLOR.—The plaintiffs are seized in fee simple of the parcel of land mentioned in the

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(a) Ante vol. 1., page 443. (b) Ib. 247. (c) Ib. 502.

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pleadings, subject to a mortgage in fee to one *Howard*. The deed creating this mortgage purports to convey to *Howard* the fee. The defeasance is contained in a separate instrument, not registered.

The defendants, *The Bank of Upper Canada*, had obtained judgment against *Howard*, and sued out execution against his lands, before the bill in this suit had been filed, and under the execution so issued they are proceeding to cause these mortgaged lands to be sold as the property of *Howard*.

This motion comes before us upon the answer of *The Bank*. It is in the alternative, and asks, either that the common injunction, already issued, may be extended to stay the sale, or that a special injunction may be now granted for that purpose.

Judgment. Had these proceedings between the *Bank* and *Howard* come within the operation of the common injunction, then, as it appears to us, that writ would have had the effect of enjoining *The Bank* from taking any steps to obtain the effect of their execution, although sued out and placed in the sheriff's hands prior to the service of the injunction. (a)

That question however does not now arise, because the common injunction, in our opinion, does not apply to the proceedings sought to be restrained. That writ in terms commands the defendants, &c., "to desist from all further proceedings at law against the complainants touching any of the matters in the bill complained of." But there are no proceedings at law between the defendants and the complainants. The proceedings at law are between *The Bank* and *Howard*; that object can only be effected, from the nature of the thing, by special injunction.

(a) *Drewry on Injunctions*, page 359; *Bullen v. Overs*, 16 Ves. 143; *Franklyn v. Thomas*, 3 Mer. 234.

This brings us to the other alternative of the motion, 1851. which asks a special injunction. The facts are admitted by the learned counsel for *The Bank* to be as I have stated them; but he argues that the principles upon which we acted in *Baby v. Harrison*, and *Walker v. City of Toronto*, negative the plaintiffs' right to a special injunction upon the present application. It is obvious, however, that these cases do not govern the present. This is not an injunction to stay proceedings at law. The plaintiffs do not assert any equity to restrain the only proceedings at law mentioned in the pleadings—namely, the proceedings of *The Bank* against *Howard*; but, admitting these proceedings to be unimpeachable, they allege that *The Bank* are now about to take steps which ought to be enjoined. The plaintiffs assert that *The Bank* are about to sell, under the execution against *Howard*, property, of which the plaintiffs are the equitable owners, although the legal estate is in the judgment debtor—that they are in effect, about to sell the property of *cestui que trust*, under an execution against the trustee—and we are asked to protect their equitable interest. It is quite plain that this object, if effected at all, must be effected by special injunction, (a) and that the cases cited have no analogy.

It is argued however, that the plaintiffs have not made out a case upon the merits. *The Bank*, it is said, made these advances to *Howard* in the belief that he was seized in fee; and, having registered their judgment without notice of the true state of facts, are now entitled to be regarded as purchasers for value without notice; or, as having a charge upon whatever disposable interest *Howard* had in the premises under the statute 13 and 14 Vict. c. 63. It is unnecessary that we should consider the proper construction of the statute, because its is ex-

(a) *Langton v. Horton*, 1 Hare, 549; *Newell v. Townshend*, 6 Sim. 419.

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1851. *Nell v. The Bank of Upper Canada.* pressly confined in its operation to judgments entered up after the 1st day of January 1851, and the judgment of *The Bank* was entered up prior to that date. Had the statute applied, it seems to us abundantly plain that it could not have had the effect attributed to it by the learned counsel for *The Bank*. But, under existing circumstances, we think the plaintiffs clearly entitled to the protection they ask.

Judgment.

MACAULAY V. PROCTOR.

Practice—Trial of issues.

A bill was filed charging the defendant with having purchased certain lands as the agent of the plaintiff and with his money, and praying to have the defendant declared a trustee of the land for the plaintiff. The evidence on the point of agency or no agency being contradictory, issues were directed to be tried as to the agency, and as to payment of the amount of purchase money having been made out of moneys belonging to the plaintiff, or having been charged against him in account by the defendant.

Argument. Mr. *Mowat* and Mr. *McDonald* for the plaintiff.
Mr. *Gwynne*, Q. C., for the defendant.

The observations of counsel were directed chiefly to the facts of the case as deposed to by the witnesses, the nature of whose evidence is fully set forth in the judgment of the Court, which was delivered by

Judgment. ESTEN, V. C.*—The bill in this case states that the plaintiff and defendant had dealings together in the lumber trade in the year 1843; that the result of those transactions was, that the defendant was indebted to the plaintiff in the sum of 478*l.*; and that it was agreed between them that out of that sum the defendant should purchase for and on behalf of the plaintiff the south half of Lot number 12, in the first concession of the township of Murray, but should

* The Chancellor had been concerned in the cause while at the bar.

take a conveyance of it in his own name for reasons which were well understood between them, and hold it in trust for the plaintiff. The bill further states that the defendant accordingly purchased the lot in question for the plaintiff, paid for it with his money, and received a conveyance of it in his own name but for the benefit of the plaintiff; that the plaintiff thereupon entered into possession of the lot and continued in possession of it until the month of June in the year 1848, when the defendant, by means of an action of ejectment, obtained possession of the property, deprived the plaintiff of his crops, and has remained in possession ever since. The bill then prays that the defendant may be declared a trustee for the plaintiff, and for the consequential relief. The bill is framed on the principle, that a person employed by another to purchase an estate for him, and afterwards purchasing it in his own name and for his own benefit, is a trustee for his employer; and also, that where an estate is purchased by one person with the money of another, the estate belongs in equity to the latter. No doubt, I apprehend, can be entertained of the correctness of these principles, supposing the evidence to establish their applicability to the present case; which, if the statement of the bill is true, involves them both; for firstly, it is mentioned that it was agreed between the parties that the defendant should purchase the property; and secondly, that he charged the plaintiff in account with the purchase money. The answer denies that any dealings took place between the plaintiff and defendant after 1840, and insists that the purchase of the property in question by the defendant was on his own account and for his own benefit. The answer also states, and it is proved, that a lease was granted of this property by the defendant to the plaintiff on the 1st of April, 1846, containing the usual and ordinary covenants between the owner of property and a tenant; and a conversation is deposed to by

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the son of the defendant, in which a discussion took place between the parties respecting the terms of this lease, without any claim of right on the part of the plaintiff. The same witness likewise deposes to a conversation between the plaintiff and himself, in which proposals were made by the witness to the plaintiff that he should purchase the lot in question from the defendant. The purchase money mentioned in the bill and in the evidence of the plaintiff, and that mentioned in the answer, differs in amount. These are circumstances which militate to a considerable extent against the claim of the plaintiff. On the other hand, we have a number of facts in the case which tell strongly in his favor. It appears from the answer itself, that after the plaintiff had been dispossessed by the sheriff, he returned, possessed himself of the crops and removed the fences, &c.; and although such a fact would ordinarily be of no importance, and would appear to be merely a wrongful act, in the present instance and in connection with the other facts of the case, it is not without weight. Tenants who, continuing in possession after the expiration of their terms, are dispossessed through the medium of the law, do not in general act in so outrageous a manner as, upon the supposition that he was nothing more than a tenant for one year, the plaintiff would appear to have done on this occasion. It is proved by several witnesses that the plaintiff was in possession of the lot from the time of its purchase in 1844, although the lease which has been mentioned, and which is the only title consistent with the defendant's claim of property to which such possession can be referred, was not made till 1846. The plaintiff's evidence is of a very forcible character. *William Robertson*, who was evidently well acquainted and in some way connected with the transactions to which his evidence relates, deposes that it was agreed between the plaintiff and defendant that the defendant should purchase the lot in

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question for the plaintiff and charge the amount against him. He states also, that he saw accounts in which the price of the lot was charged by the defendant against the plaintiff; and although this evidence may not be demonstrably the best evidence which the circumstances of the case admit of, yet it raises a strong presumption that evidence exists of a decisive character which further inquiry would elicit. Then *William Robertson, Jacob Macaulay, and Fox*, all depose to admissions by the defendant that he had purchased the lot for the plaintiff. The evidence, moreover, strongly indicates the existence of dealings between the defendant and plaintiff, either in his own name or that of *P. L. Macaulay*—but with a perfect knowledge on the part of the defendant that it was for the plaintiff's benefit—in 1843 and 1844, although the answer positively denies, and his son in his evidence also denies, that any such dealings took place after July 1840. This evidence it is difficult to disbelieve, and it must be considered as greatly weakening the evidence of the defendant and the denial in the answer. Again, we have an agreement and bill of sale in the name of *P. L. Macaulay* as the apparent owner; the agreement indeed not proved, but sufficiently so, perhaps to warrant inquiry, if it were necessary. But there is much in connection with those instruments which supports the plaintiff's case. Their being in the name of *P. L. Macaulay* is consistent with the testimony of the plaintiff's witnesses, because they say that the name of this individual was employed only as a cover. The bill of sale includes a variety of farming stock and implements which were all on Lot number 12, concession A, in the township of Murray, which was the plaintiff's homestead. The instructions for the preparation of these instruments were given by the defendant, *P. L. Macaulay* and *Wm. Robertson*; and the plaintiff was present and acting in the matter, as appears from the defendant's

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own evidence. The account C. contains a curious item on the debit side—namely, 12*l.* 5*s.* for the *use of Lot 12* for 1844. The rent mentioned in the lease is 12*l.* 15*s.*, which is the exact interest on the purchase money (212*l.* 10*s.*) mentioned in the answer. It is a remarkable circumstance that the plaintiff, who is a marksman, was present at the execution of the agreement and bill of sale, and at the settlement of accounts between the defendant, acting by *T. A. Proctor*, the witness, and, as he alleges, *P. L. Macaulay*. According, however, to the account given of the matters in question by the defendant's witnesses in their evidence, and by the defendant in his answer, the plaintiff would appear to have had no concern whatever with them, and his presence and interference upon the occasion referred to is not accounted for. Under all these circumstances, we think it right to direct that the parties shall proceed to the trial of the following issues—namely :

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1st. Whether it was at any time, and when, agreed between the plaintiff and defendant, that the defendant should purchase the south half of lot No. 12 in the first concession of the township of Murray for the plaintiff, or on his behalf or as his agent, or pay for the same on account of the plaintiff or with or out of his money, or should charge the price of the same in account against the plaintiff.

2nd. Whether the defendant did at any time, and when, purchase the said half-lot for or on behalf of the plaintiff or as his agent.

3rd. Whether the price or purchase-money of the said half-lot, when purchased by the defendant, was paid with or out of money belonging to the plaintiff, or whether such price or purchase-money was at any time, and when, charged in account against the plaintiff by or by the direction or with the consent or sanction of the defendant.

SMITH V. MUIRHEAD.

1851.

Practice—Notice of filing pleadings.

The omission to serve a notice of having entered an appearance, or of having filed an answer, or a surrejoinder, or replication, pursuant to the 47th order, will not entitle the opposite party to treat such proceeding as a nullity or as irregular.

The bill in this case was filed to restrain proceedings at law; an appearance had been entered within fourteen days, the time prescribed by the 71st order of May 1850, but no notice of such appearance being entered had been given to the plaintiff as directed by the 47th order; and

Mr. *Mowat* for the plaintiff, now moved,—upon an affidavit of service, the registrar's certificate of the state of the cause, and an affidavit negating the service of any notice of appearance having been entered,—for the common injunction for want of appearance; contending that until the notice was served the defendant must be treated as in default—citing *Bradstock v. Whitley (a)*, *Wright v. Angle (b)*, *Johnson v. Tucker (c)*.

Per Cur.—The 47th order is directory only, and cannot possibly entitle the plaintiff to treat this appearance either as a nullity or irregular. If any case should occur where, from want of notice, the party to receive it could shew that he had sustained damage, no doubt the court would give him relief.

Motion refused.

CHRISTIE V. SANDERS.

Practice—77th Order.

Where a bill was filed against a trustee and executor for an account, and the bill also sought to have the trustee removed for misconduct, the court refused an order for a summary reference to the master, under the 77th order of May, 1850.

The bill, in this case, was filed by some of the devisees and the executrix mentioned in the testa-

(a) 6 Beav. 61. (b) 11 Jurist 987, S. C. 6 Hare 107. (c) 11 Jurist 466.

1851. *Christie*
v.
Sanders. tor's will, against the other devisees and the acting executor and trustee, praying an account of testator's estate, and the removal of the trustee.

Argument. Mr. *R. Cooper*, for the plaintiffs, now asked for a summary reference under the 77th order of May, 1850, for the purpose of taking the accounts. The removal of the trustee would be a matter for the consideration of the court, on further directions, which, he submitted, might be reserved by the order.

Mr. *Turner*, for the defendant *Sanders*, opposed the motion. The 77th order does not apply to a case like this; here "the state of the account only" cannot be said to be the only matter in question, neither is the principal object of the suit to obtain that account. Under these circumstances, he submitted the court would not grant the motion.

Mr. *McDonald*, for the defendants *Saxon* and wife, also opposed the granting of the order.

Judgment. The Court asked Mr. *Cooper* if he were willing to waive that portion of the prayer which sought the removal of the trustee, which being declined, the motion was refused; costs to be costs in the cause.

MCINTOSH V. ELLIOTT.

Practice—Contempt.

August 22. Where an order is made upon a receiver for payment of a sum of money, the court on default will commit for a contempt of such order, without requiring any further order to be served.

Statement. The receiver in this cause had passed his accounts before the master, who, by his report, directed the balance remaining in the hands of the receiver to be paid in on the twenty-first day of June last.

On the twenty-seventh day of June, an order was made, on notice, that the amount should be paid in within four days after service of the order; and in default, that the receiver should be committed.

1851.
McIntosh
v.
Elliott.

Default having been made, Mr. Mowat now produced an affidavit of the personal service of the order, and the Registrar's certificate that the money had not been paid in, and moved *ex parte* for an order of committal forthwith; he urged, that upon the 79th of V.C. Jameson's orders, this was the proper course of procedure; he referred also to *Daniel's* Chancery Practice, page 1988.

The Court made the order as moved.

Judgment.

WHITE V. CUMMINS.

Practice—77th Order.

Where any of the defendants are infants, the Court will not grant a summary reference under the 77th order, until a guardian to the infant defendants has been appointed.

This was a bill filed by an executor against the widow and children of the testator, seeking to compel a settlement of the assets of the testator. Some of the children were infants, and had been served with notice of the motion at the same time that they were served with the subpoena.

Mr. Turner, for the plaintiff, now moved for an order for a summary reference to the master to take the accounts.

Mr. Mowat, contra, objected *inter alia*, that no decree could be made against infants before a guardian *ad litem* had been appointed for them.

The Court concurred in this objection, and refused the application.

Argument.

1851.

LEY V. McDONALD.

Practice—Injunction.

August 8. The affidavits on which an *ex parte* injunction is applied for, must (to guard against abuse of that process,) present a candid statement of the whole case, and must set forth not only the facts which the plaintiff thinks to be material, but such as are in truth material to the determination of the application: An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits.

The bill in this cause was filed on the 25th of July last, and by it the plaintiff claimed to be a partner of the defendant in respect of certain dealings and transactions as a provision merchant; set forth at length the terms and conditions of the alleged partnership; charged the defendant with having excluded the plaintiff from the books and business of the partnership, and prayed an injunction and a dissolution of the partnership.

Statement. The plaintiff at the time of filing the bill, made an affidavit verifying the statements thereof, and thereupon moved *ex parte* and obtained a special injunction restraining the defendant, "his attornies and servants, from preventing the plaintiff, his counsel, attornies and agents, from having, and from in anywise interfering with their having free access at all times to the books and papers of the copartnership in the bill of complaint mentioned, and each and every of them," and restraining them, "and each of them, from collecting or receiving any debts due to the said copartnership; also from selling or in any way transferring, removing or disposing of any beef, pork, hams and bacon belonging to the said copartnership which are yet on hand undisposed of, or any, or either of them, or any part thereof respectively, and from selling or disposing of any other goods or effects belonging to the said copartnership."

On the 5th of August the defendant put in his answer, denying the existence, or any agreement for the creation, of a partnership between the plaintiff

and defendant, alleging that plaintiff had been employed as the hired servant of the defendant in assisting him to carry on the business of provision merchant; that in consequence of dishonest conduct, he had been compelled to dismiss the plaintiff from his employ, and that such dismissal took place in the presence of other persons, without any assertion by the plaintiff of the existence of any copartnership.

1851.
Ley
v.
McDonald.

Mr. *Turner* for the defendant, moved this day upon notice to dissolve the injunction so issued.

Mr. *Morphy*, contra.

THE CHANCELLOR.—This motion to dissolve an injunction granted by my learned brothers during the present vacation upon an *ex parte* application, is supported by the answer of the defendant and several affidavits. Upon the view which we take of this case, it becomes unnecessary to form any opinion upon the conflicting statements laid before us. We may remark, however, in passing, that the evidence appears to us to preponderate greatly in favor of the defendant. Not only have the allegations in the plaintiff's affidavit been denied by the defendant, but various collateral facts have been established by independent evidence, which, if not wholly irreconcilable with the plaintiff's case, do, nevertheless, tend very strongly to corroborate the statements of the defendant's answer. It is obvious that this injunction could not have been granted with propriety, upon the evidence before us. (*a*)

But several circumstances have been detailed in the answer and affidavits, without contradiction; which, as it appears to us, disentitle the plaintiff to this injunction, irrespective altogether of the merits. Those who apply for an *ex parte* injunction come

(*a*) *Peacock v. Peacock*, 16 Ves. 49; *Fairburn v. Pearson*, 2 McN. & G. 144.

1851. under a contract with the court, as it has been expressed, to present a full and fair statement of the facts of the case. (a) The *ex parte* exercise of this jurisdiction is useful and necessary; but, unless guarded by the application of the principle I have stated, it may be applied to the most improper purposes, and lead to the greatest injustice. In the present case the plaintiff has, as it appears to us, failed to fulfil this implied engagement in several particulars.

Ley
v.
McDonald.

Judgment.

First, with respect to the books of this supposed copartnership, access to which had been refused to the plaintiff, as he alleges; it is now stated without contradiction, and we must therefore assume it to be so, that no such books as the affidavits imply exist. The entries respecting these particular dealings are to be found in the books of the defendant's general business, intermixed with his other transactions. This fact, so omitted, if not misstated, is not only material with reference to the form of the injunction, but has an important bearing upon the question of partnership or no partnership, which lies at the foundation of the plaintiff's claim.

Then, as to the particular parcel of pork and beef which seems to have been the immediate cause of this suit, the affidavit of the plaintiff states that this property, after having been transferred to him at Montreal, in pursuance of an alleged arrangement of the partnership affairs, had been consigned to the care of the defendant at this city, as the property of the plaintiff, and that possession thereof had been obtained by the plaintiff by improper means, some time prior to the filing of this bill. Now, not only has the whole statement respecting the arrangement at Montreal been denied by the answer, but it has been stated, and this allegation is uncontradicted,

(a) *Castelli v. Cook*, 7 Hare, 89.

that the property in question reached this city under the personal charge of the plaintiff, when, so far from having treated it as his own property, although he himself deposited it in Mr. *Tinning's* warehouse, he never, during the progress of the transaction, set up any claim to the ownership; on the contrary, the freight was paid to Mr. *Tinning* by the plaintiff, partly by check of the defendant, and partly in money which he said that he had received from the defendant. Lastly, the bill of lading was obtained from Mr. *Tinning* upon some misrepresentation, and the original has not been produced upon the argument, although that would have been material, but a copy has been appended to the plaintiff's affidavit.

1851.

Ley
v.
McDonald.

But it is unnecessary to dwell upon these and other more minute particulars, in which the plaintiff must be taken, upon this application, to have misrepresented the facts of the case, because there is one circumstance narrated in the answer, the suppression of which is, in our opinion, conclusive against the plaintiff upon this motion. It is sworn in the answer without contradiction, and the statement is corroborated by several affidavits, that upon the 30th of June the defendant detected the plaintiff removing clandestinely from the place of business, part of the partnership property; that after some altercation, in the course of which the plaintiff at first denied the charges, and then endeavored to exculpate himself, the defendant took him to his counting house, and informed him in the presence of two persons, whose depositions are before us, that he was under the necessity of dismissing him from his employment, as the conduct to which I have adverted, had destroyed all confidence in his integrity. Lastly, that upon this occasion, and in consequence of the transactions I have described, the plaintiff withdrew without having asserted his rights as partner, indeed, without remonstrance of any kind. This statement, so corrob-

Statement.

1851. rated is not denied, and must therefore, for the present purpose, be taken to be true. Now, although I do not say that my learned brothers must necessarily have refused the injunction had this occurrence been disclosed; still, its importance in determining the question before them is too obvious to need comment. It was extremely material in two respects: First, as to the main question—partnership or no partnership—and then, in determining whether an *ex parte* injunction could properly be granted in the end of July, it was obviously very material that my learned brothers should have been informed that the occurrence which I have described had taken place in the preceding month of June. Had the plaintiff asserted, or had the general complexion of the case warranted the inference, that these facts had been omitted because they were considered immaterial, that would not have presented an answer to the objection. The plaintiff is bound to bring forward, not only the facts which he thinks to be material, but such as are in truth material to the determination of the application. Lord *Cranworth* on a recent occasion said (a) “that applications for special injunctions are governed very much by the same principles which apply to insurances, in which cases the party applying to insure is bound to state, not only all the facts which he believes are of importance, but all the facts that might influence the party about to insure, the absence of which *bona fides* will vitiate the policy”

Judgment.

But this case, as it seems to me, does not depend upon that principle. The process of the court has been obtained by the plaintiff, *ex parte*, upon an uncandid statement of his case. The plaintiff has been wanting in that full and fair statement of facts which it was his duty to have furnished. He has suppressed material circumstances, and, had our

(a) *Dalglisch v. Jarvie*, 14 Jurist, 945; S. C. 2 McN. & G. 231.

opinion upon the whole matter been different, it would still have been our plain duty to have dissolved the injunction, with costs, whatever might have been our opinion upon the merits.

1851.

Ley
v.
McDonald.

CAMPBELL V. GORHAM.

Practice—Contempt—Costs.

The Court refused a motion to commit for breach of an injunction, where the defendant made an affidavit of having complied with the writ, even though the affidavit was contradictory to a statement previously made by him; but the defendant was ordered to pay the costs of the motion, as his conduct had caused the motion to be made.

August 8, &
Sept. 9.

The bill in this cause was filed by *Eveleyn Campbell* against *Walter Gorham*, alleging that a partnership had existed between the plaintiff and defendant; charging improper conduct against the defendant in the management of the partnership affairs; setting forth the copy of a statement of the assets of the co-partnership furnished by the defendant to the plaintiff—from which it appeared that notes to the amount of 1,613*l.* 13*s.* 0*d.* were in the hands of the defendant, as managing partner. Upon the affidavit of the plaintiff verifying the statements of the bill, a special injunction had been obtained, restraining the defendant from placing or retaining the notes, &c., of the partnership in any other place than with the solicitor of the partnership.

Statement.

After service of this injunction, the defendant deposited with the solicitor some notes, amounting to a few hundred pounds, and refused to give the plaintiff's solicitor any satisfactory account of why the notes deposited amounted to so much less than appeared by the statement made out by the defendant.

Mr. *Morphy*, for the plaintiff, now moved upon notice for an order to commit the defendant, for breach of the injunction, on the grounds stated.

Argument

1851. Mr. *Turner*, for the defendant, read an affidavit made by the defendant, stating, in effect, that the notes deposited with the solicitor embraced all the notes belonging to the partnership. Under such circumstances, he submitted the Court would never commit for a contempt, as that would be in effect punishing a man for not doing that which he swears he is utterly unable to do.

Campbell
v.
Gorham.

Argument.

Sept. 2. THE CHANCELLOR.—The breach of the injunction issued in this cause, for which the plaintiff now moves that the defendant may be committed, is—that all the partnership securities have not been delivered in pursuance of the writ, to the solicitor of the firm.

Judgment.

In answer to this application the defendant swears that he has delivered to the solicitor named all securities in his possession, custody or power.

The plaintiff has not himself any knowledge as to the amount or character of those securities, and has not furnished us with any evidence upon the subject except the balance sheets prepared by or forwarded through the defendant; but he argues that the answer of the defendant, being quite irreconcilable with those documents, and therefore discredited, the defendant must be treated as having failed to furnish any answer to this application. The defendant, on the other hand, denies the correctness of the balance sheets in question; he offers some explanation, although a highly unsatisfactory one, of the cause of this inaccuracy, and affirms, as I have said, that all the securities have been deposited.

Under such circumstances, it would be quite unwarrantable to order the defendant's committal.

We are not now considering the effect which it may be proper to give to those representations of the

defendant—if they shall turn out to have been representations made by him—upon the taking of the account between these parties. The question before us is, whether the defendant has been guilty of a breach of this injunction. In determining that question, it would be obviously improper to treat the unverified statements in these papers as true, in opposition to the oath of the defendant. Are we to commit the defendant for the breach of an injunction established by his mere statement—assuming those papers to be properly treated as his statements—in opposition to his denial of such breach upon oath?

1851.

Campbell
v.
Gorham.

But, while we think that the motion cannot be granted, we are also of opinion that the defendant's conduct has been very unwarrantable. Taking the view of the case most favorable to him—assuming errors to have crept into these statements without any fraudulent intent; assuming, even, that they are not to be treated as proceeding from the defendant—still they were documents of an important character furnished to his co-partner at least through him; and when he was informed by the bill that the plaintiff treated them as correct, and had made them the foundation of the suit, it was his duty to have furnished him, at the earliest possible moment, with the information now submitted to the court in answer to the application. But, so far from pursuing that course—so far from supplying the information which it was his duty to have furnished when applied to by the solicitor for the plaintiff, in order, as was expressly told him, to avoid the necessity of the motion, his reply is only calculated still further to mislead. He seems to have intimated that there were further securities besides those deposited, which were in suit, and in the hands of persons whose names he refused to disclose.

Judgment.

Now, without considering the vague and unsatisfactory manner in which the plaintiff's allegations

1851. have been met, founded as they are upon documents which he might be well excused, at least, in treating as documents prepared by the defendant—and without referring to the peculiar duty imposed upon the defendant as the sole manager of this partnership concern, to have had at all times accurate information ready, and to have furnished it unreservedly to his co-partner—without enlarging upon those topics, it appears to us that the defendant has by his own conduct, if not misconduct, invited this motion; and that in refusing it, the order must direct the costs to be paid by the defendant.

Campbell
v.
Gorham.

Judgment.

CRAWFORD V. WILKINSON.

Practice—77th Order.

August 26. On a motion for a summary reference, the affidavit verifying the bill must be filed before notice of the motion is served, and must be referred to by the notice.

This was a suit for the foreclosure of a mortgage, and a notice having been served of the plaintiff's intention to apply for a summary reference under the 77th order of May, 1850.

Mr. *Hagarty*, Q. C., for the plaintiff, now moved for the usual reference under this order.

Mr. *Gwynne*, Q. C., for the defendant *Torrey*, a second mortgagee, submitted to the order being made.

Mr. *Brough*, for the defendant *Wilkinson*, objected that no affidavit of verification had been filed when the notice of motion was given, nor did the notice state that the motion would be made on affidavit. The motion, he submitted, must therefore be refused, but he did not desire the costs of opposing it.

Per Cur.—The rule is, that any affidavits intended to be used upon a motion must be filed when notice

Judgment.

of the application is served, and they must also be referred to in such notice. As we know of no ground for excepting the present motion from the general rule, the motion, we think, cannot be granted; but as Mr. *Brough* waived any claim that his client might have for the costs of appearing, it will be refused without costs.

1851.

Crawford
v.
Wilkinson.

J. L. M. C.

HAGGART V. ALLAN.

Partnership—Laches in commencing suit.

Where a plaintiff filed a bill alleging that he and the defendants had agreed to be partners in certain government contracts, and it appeared that the defendants had repudiated the partnership as soon as the contracts were entered into; that the contracts were to be completed in a year, and that the bill was not filed for about eighteen months after the repudiation—the Court offered the plaintiff a reference to the Master to enquire the cause of the delay, or that his bill should be dismissed without costs.

Dr. *Connor*, Q. C., and Mr. *McDonald*, for the Argument, plaintiff.

Mr. *Mowat* for the defendants.

SPRAGGE, V. C.*—The material facts of the case appear to be as follows:—

Previously to the month of January, 1846, the Imperial Government having determined upon the erection, at Kingston, of certain military works, five in number, invited tenders for the purpose. Among others, the plaintiff, through the instrumentality, as it would appear, of a personal friend of his, Mr. *Samuel Shaw*, a clerk in the Engineer Department, was invited to tender for the contemplated works. The plaintiff and defendant *Allan*, both residents of Perth in this province, repaired to Kingston for the purpose of examining the plans and specifications at the Engineer Office. *Matthews* was a resident of Kingston; and the parties severally were repeatedly

* The Chancellor was concerned in the case while at the bar.

1851.

Haggart
v.
Allan.

at the Engineer Office, in order to obtain the necessary information upon which to found their tenders. Calculations for this purpose were made by the plaintiff with the assistance of his clerk, *Alexander McKenzie*, and by defendant *Matthews*—whether or not made by *Allan* does not appear; I rather infer not. While this was going on, negotiations were entered upon between the parties with a view to the formation of a partnership between them in the event of each of the three, or two of the three, succeeding in getting contracts upon the tenders to be sent in. They were to send in, severally, tenders for each of the works. The parties talked over together the nature and probable costs of the works; the calculations made by them respectively were open for reference and examination; they deliberated together as to the amounts which it would be advisable that each should insert in his tenders, and the tenders were filled up accordingly, and apparently in concert, and sent in, on the part of the plaintiff and of *Matthews*, for all the works; on the part of *Allan*, for those on Point Frederick only. Some discussion took place as to the tenders for these works. For Point Frederick, *Matthews* proposed to tender for a sum which the plaintiff thought much too low, and he was induced to increase the sum by between two and three thousand pounds, as I infer from the evidence; his tender was for 18,100*l*. *Allan*, who produced no calculations, tendered for 19,000*l*., and the plaintiff for 21,000*l*. *Allan's* tender was the one accepted. For Cedar Island, *Matthews's* tender was for 12,000*l*., based, as *McKenzie* (*Haggart's* clerk) says, upon his calculations, and was the one accepted.

Judgment.

Before the negotiations between plaintiff and defendants with a view to a partnership, the defendants had themselves contemplated, if not finally agreed upon, a partnership between themselves, in the proposed works.

The tenders sent in bear date 15th January, 1846, and appear to have been sent in on that day. The works were to be finished within twelve months from the date of the acceptance of the contract, under a heavy penalty. None of the tenders made by the plaintiff were accepted.

1851.

Haggart
v.
Allan.

On the day following that on which the tenders were sent in, it became generally known among those tendering which of them had been successful; and it appears, though some of the witnesses thought otherwise, that *Allan* was aware, before he left for Perth, that his tender for the works at Point Frederick was accepted, subject however to his obtaining additional sureties for the due execution of the work. The evidence shews that he made applications and inquiries, with a view to obtaining additional sureties, but not succeeding he left for Perth; he and the plaintiff both left on the day following that on which the tenders were sent in, but not together. After they had left, *Matthews* exerted himself to procure the additional sureties required for the execution of the works at point Frederick. He was apprehensive, he says, that if this was not done the contract would devolve upon him, which was lower by 900*l.* than that of *Allan*. It is probable, too, that he was unwilling to lose the profits of a contract taken at upwards of 3000*l.* above his own estimates.

Judgment.

Finding that additional sureties could be obtained, *Matthews* wrote to *Allan* informing him how matters stood, and *Allan* thereupon went to Kingston. The contents of *Matthews'* letter were communicated by *Allan* to the plaintiff, and he also returned to Kingston, with a view no doubt of taking his share in the contemplated partnership. But here he was met with difficulties on the part of the defendants; they refused to admit him as a partner, on the ground that as they had had to find new sureties, it was the same thing

1851.

Haggart
v.
Allan.

Judgment.

as if the contract had been obtained upon new tenders; and *Matthews*, who seems to have taken a more active part in the discussion than *Allan*, said he believed they would not have got any job at all if the plaintiff's name had been used with theirs; and he urged that it was unreasonable in the plaintiff, under the circumstances, to desire to be admitted a partner. The plaintiff, on his part, insisted upon his right, and declared his readiness to keep the agreement and to furnish money or whatever else might be necessary to carry on the works; he observed also, that each party tendering was to furnish his own sureties, and said that he could have found the additional sureties if he had been informed in time. The defendants persisted in denying plaintiff's right to be admitted a partner, and refusing absolutely to admit him; and the two defendants prosecuted the works for which their tenders had been accepted. This meeting took place about a fortnight, as I gather from the evidence, after the tenders had been sent in. *Matthews*, in his endeavours to procure additional sureties, had found the contemplated partnership with the plaintiff a difficulty in his way; and it would appear that those, or one of those, who became the additional sureties did so with the understanding that he was not to be a partner: whether he urged this to the plaintiff, among his reasons against his being a partner, does not appear.

Nothing further appears to have been done in reference to the contemplated partnership until towards the close of the same year, when plaintiff made some proposition with a view to being admitted a partner, which was not acceded to, and he filed his bill in this Court on the twenty-second day of July following. There are other facts in the case besides those to which I have referred, which I shall find it necessary to allude to by and by.

The first question that arises is, whether what passed between the parties, in relation to a partnership, amounted to a binding agreement to enter into a partnership upon an event or contingency specified, or whether it rested in negotiation merely. The defendants by their answer, deny that a partnership was agreed upon; and after setting forth their account of what passed, they add, "all of which however was left wholly open to future negotiation and agreement, after the result of their tenders should become known."

1851.

Haggart
v.
Allan.

The question then is, whether what passed amounted to a partnership or an agreement for a partnership, or was it merely such an expression of concurrence by all parties as to the desirableness of a partnership as led the plaintiff, with a considerable degree of confidence, to believe that it would result in a partnership, and so induced him to act as he would have acted if a partnership had been unequivocally agreed to. Their mode of dealing with one another, communicating their calculations and opinions, discussing the subject of the works, and making their tenders, was certainly that of persons having a common interest. The defendants have failed in proving that contractors were in the habit of communicating with one another as to their calculations at all, in the manner that these parties did; still, what passed might have been in the confidence felt by the plaintiff, though without any positive agreement, that the negotiations for a partnership would be carried out and a partnership eventually entered into.

Judgment

I have examined the evidence carefully, with a view to determining this point, and I think it is sufficiently established that an agreement was actually entered into between the parties for the formation of a partnership upon the contingency before referred to.

1851.

Haggart
v.
Allan.

My brother *Esten* differs from me in some measure, upon this point, and thinks that, independently of other points in the case, an issue would be proper to determine this question.

Judgment.

It is urged further, on behalf of the defendants, that even if there was an actual agreement between the parties, still it was too indefinite, the amount of capital to be advanced by each not being specified nor what personal attendance and superintendence each party was to give in the progress of the works. As to the latter point, it was discussed between the parties, it being understood that *Matthews* would be present the whole time; *Allan* the same, with the exception of such time as he might find it necessary to be absent at his farm; and *Haggart* to be present the whole time, either by himself or his agent. This appears to have been satisfactory to all parties. It was, however, agreed that the more definite arrangements upon this point should be left till after the contracts were delivered out. As to their not providing what amount of capital was to be furnished by each, a partnership of this nature stands upon a very different footing from an ordinary partnership: here, it was for the execution of a contract for certain specific works, to be executed in a time specified, for sums specified to be paid for in twelve different portions, as the works reached certain specified stages in their progress towards completion. The sums required for paying workmen, and the like, were a matter of calculation, rather than discretion; each party would of course have to contribute equally, or, as is often done in such cases, the money to be raised upon the credit of the partners. The case of *Downes v. Collins* (a), cited by Mr. *Mowat*, was peculiar in its circumstances, and does not apply here. In *McKay v. Rutherford* (b), in the Privy Council, in appeal from

(a) 6 Hare, 418. (b) 13 Jurist, 21.

Lower Canada, the agreement was certainly not more definite than in this case, yet it was held sufficient. That case was, like this, an agreement for a partnership in a contract for the execution of a public work of the Imperial Government.

1851.

Haggart
v.
Allan.

It is contended that a partnership will not be established, or a decree made for the specific performance of an agreement to become partners; and that the plaintiff, if entitled to anything, could be entitled to that only. It is certainly true that, for the successful conduct of partnership business, mutual confidence and a spirit of harmony would seem to be essential, and that these could scarcely be looked for where one party is forced upon another by the decree of a court; still a party is entitled to be placed in such a position that he may enforce his rights; and I think it is established, that where the partnership is not for an indefinite time, (in which case it would be refused, as the parties might themselves dissolve it immediately afterwards,) the Court will give relief upon a bill for specific performance.

Judgment.

Indeed, the objections to specific performance apply with much less force to such a partnership as was contemplated between these parties, as there was comparatively little left to the discretion of the parties; and, though mutual confidence and good understanding would be highly desirable between them, their absence could have a far less injurious effect upon the interest of the partners than in the case of a general partnership.

I am not clear, however, that specific performance would have been the proper relief to be sought in this case. If, by what was agreed between the parties, a partnership was constituted, it would not be so. An agreement to join together in the execution of a work, and to share in its profit and loss,

1851. would be a partnership. This was an argument subject to the contingency of a contract for the work being obtained, and I do not know that its being subject to such contingency would alter the character of the agreement. Suppose it had been in writing, as definite as could be, with nothing whatever left open for future discussion or arrangement, there would, in such case, be nothing left to be decided between the parties in the way of constituting a partnership; such agreement then would be a partnership, or nothing. Here, some things were left open, upon which I have before remarked; I think the agreement was sufficiently definite without them, and that it was, in fact, an agreement to share in the profit and loss which should accrue from the contemplated, though contingent, execution of certain works, and so a partnership (a). This, however, is not a point upon which I am free from doubt.

Judgment.

The bill in this case is not filed for the specific performance of an agreement to enter into a partnership, but for an account, and to restrain the defendants from receiving any further moneys from Government in payment for the works.

If the plaintiff had been admitted as a partner, and acted as such, could he have filed such a bill before the final completion of the works, with a view to a distribution of the profits upon their completion? Here indeed he was not admitted as a partner; and in regard to his position upon the bill, an anonymous case is cited from the rolls (b), where it is said, "on a bill for specific performance of an agreement to let the plaintiff into trade, his honor said he never knew an instance that the Court decreed an account of the profits of that trade from the time the plaintiff ought to be let in, as was desired." This bill, though not

(a) England v. Curling, 8 Beav. 129. (b) 2 Ves. sen. 629.

in terms for specific performance, complains that the plaintiff was not admitted as a partner, and, as in the case in *Vesey*, prays an account of profits from the time the plaintiff ought to have been let in. I refer to this case as shewing that a party excluded from a partnership is certainly in no better position in regard to his right to an account than an admitted and acting partner. It would scarcely be contended, I think, that what is prayed for by the bill would have been decreed to the plaintiff if an acting partner before the completion of the works. What then is the equity upon which he asks such relief now, that he has been excluded from the partnership? His exclusion may have entitled him to some relief, but I question if to the relief prayed for, and at that time.

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Allan.

The question arises, what was the proper course for the plaintiff to take upon the defendant's refusing to admit him as a partner, and when should he have taken such course? Judgment

At the meeting which took place between the parties about a fortnight after the giving in of the tenders the plaintiff claimed to be admitted as a partner; he insisted upon his right urgently and vehemently: the defendants denied his right, urged reasons why, in their judgment, he had no right, and why, as they conceived, it was unreasonably in him to ask to be admitted as a partner; and absolutely refused to admit him. This took place about the latter end of January or beginning of February, 1846. From that time, the plaintiff on the one side, and the defendants on the other, were in a position of absolute antagonism; works in which he claimed to participate as a partner were to be commenced immediately, and to be completed in a twelvemonth; works to which, if a partner, he was to contribute capital and labor, as well as to look for a share of profit. It was manifestly a case in which his rights should have been asserted

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Judgment.

promptly. A formal claim in writing, either by himself or through his professional adviser, would have been a proper course; a distinct intimation that his claim was not abandoned, but insisted upon, and would be enforced by such remedy as the law afforded; and if such assertion of right were not promptly responded to, then an appeal to the law for redress. If wrongfully excluded by those who were his co-partners, that would, I apprehend, be a good ground on which to come to this court. It is, at all events, the ground on which he *has* come to this court; and, if entitled to file his bill at all, I do not see why he could not have filed it within a month after his exclusion, as well as after seventeen months. I should certainly say, that, in the circumstances in which the plaintiff was placed, it was peculiarly incumbent upon him to act promptly. But, what did he do? After being pointedly excluded from the partnership, as having no right to be a partner, he left the two defendants to execute the works themselves; and, during the whole of the season during which the great bulk of the works was to be executed, he pursued his own business at Perth, abstaining from any interference with defendants, any assertion of right or even any application for admission as a partner. Late in the year, towards its close, he appears to have made such application, which was refused, and he again lies by until he files his bill. It is reasonable to inquire how this delay may have affected the defendants, and what inference they may have drawn from it. Passing over the loss of evidence by the death of *Sir Richard Bonnycastle*, and the absence from the country of Mr. *Laidley*, the Deputy Commissary General—which evidence I do not assume to have been, but which may have been material to the defendants—the position of the defendants appears to me to have been injuriously affected by plaintiff's delay. If he had pressed his claim, especially by suit, it would have naturally led them to a careful inquiry

at the hands of those competent to advise them, 1851.
 whether they were bound to admit plaintiff as a partner or not. If they found themselves bound to admit him, they might have availed themselves of his capital and labor, so that he might have borne the burthen as well as received the profits of the partnership. He ought indeed to have endeavored to obtain the opinion of this court, at as early a stage as possible, whether the grounds for his exclusion insisted upon by defendants were valid or not. As the plaintiff did not pursue his rights after his vehement and angry assertion of them at *Bamford's*, the defendants might infer that he did not intend to persist in them; they might, not unreasonably, construe his passiveness into an acquiescence, on his part, in their exclusion of him; in their denial of his right; and perhaps in their reasons for such denial; or they might conclude that, upon calm reflection, he had become convinced that it was, as *Matthews* urged that it was, unreasonable in him, under the circumstances, to claim to be a partner; or at all events, that he had, for whatever reason, abandoned his claim. There was nothing done by the plaintiff to negative such inferences, and I think they were natural inferences under the circumstances.

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 v.
 Allan

Judgment.

In *Watson v. Reid* (a), which was a suit by the vendor of real estate against the vendee for specific performance, a deposit had been paid by the vendee, and an abstract of title delivered by the vendor. The vendee gave notice that he objected to the title, and abandoned the contract, and shortly afterwards demanded a return of the deposit, which was refused. About a year after the notice of abandonment, the vendor filed his bill. For the defendant, it was insisted that, after, so long a delay, the plaintiff must be deemed and considered to have acquiesced in the

(a) 1 R. & M. 236, S. C. Tamlyn 381.

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abandonment of the contract by the defendant. The bill was dismissed, and the Master of the Rolls in giving judgment said, "this is a most unreasonable delay, and the vendor is not entitled to the interference of this court."

In *Heaphy v. Hill* (a), there was an agreement for a lease; the defendant, the intended lessee, refused to execute it, and the bill was not filed for about two years afterwards, and the only reason assigned for the delay was, that the attorney for the plaintiff had mislaid the papers relating to the transaction. On the ground of the delay, the bill was dismissed.

Judgment In *Walker v. Jeffreys* (b), the plaintiff was a lessee of mines, under a lease renewable; the defendant refused to renew, and the bill was not filed for about two years and a-half after such refusal. The Court held, that the delay amounted to an acquiescence in the refusal to renew the lease, and disentitled the plaintiff to relief.

The necessity for prompt action, and the amount of delay which should disentitle a party to relief in a court of equity, must be measured by the nature of the case. Comparing this case so measured with the cases referred to, I cannot but think that the delay is greater here, and affords a stronger presumption of acquiescence and abandonment, on the part of the plaintiff, than in the cases referred to.

There is another feature in this case connected with the plaintiff's delay. From the nature of the works, it was necessary, in order to their completion within the year, that the great bulk of the work should be finished in the course of the summer and autumn of 1846, before the winter set in. It was

(a) 2 S. & S. 29. (b) 1 Hare 341.

near the close of that year that plaintiff renewed his application to be a partner. By that time it was no doubt ascertained and known that the contracts would be profitable ones. Had they turned out otherwise, plaintiff was not in a position to be subject to a loss. I will not assume that he abstained from pressing his claim, lest he might subject himself to a loss, but his position at the end of the working season of 1846, as claimed by himself, was in effect this—to share in the profits without having contributed labor or capital, or incurred the risk of loss. It is true that his exclusion was the defendants' wrong, but immediately upon the commission of that wrong his duty commenced of seeing to its being righted; that duty he has neglected, without reason given or explanation offered. Considering the nature of the case, I cannot but think his delay a most unreasonable one, and such as should disentitle him to relief in this court. It may be questioned whether the plaintiff's laches is sufficiently made a ground of defence by the defendants in their answers. In the cases cited, the defendants insisted upon the laches of the plaintiffs as an acquiescence in their (the defendants') refusal to perform their agreement. In this case, the laches is not insisted upon as amounting to acquiescence, but it is nevertheless made a ground of defence. The answer says, that defendants proceeded with the execution of the respective parts of the said works contracted for by them respectively, and that the said plaintiff made no further advances whatever in respect of bringing about the formation of the said proposed partnership until the latter end of the year 1846, when a great part of the works contracted for by the defendants respectively was finished, and when the plaintiff conceived that the works would turn out profitable; and that he then made a proposition to join the defendants in partnership, which they declined. I think that this point being so raised by the answer, it was sufficient to put the plaintiff to explain his delay.

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Judgment.

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Judgment.

There are other points raised by the defendants upon which it is well, I think, to express an opinion. They allege that the plaintiff tampered with a Mr. *Samuel Shaw*, a clerk in the Engineer Department, and through his means obtained a knowledge of the amounts of what are termed the approximate estimates prepared in that department, and by which the District Commanding Officer determines, in a great measure what tenders to accept. Great care was taken to keep these from the knowledge of the persons tendering; indeed, but few in the department were acquainted with them. It does not appear that Mr. *Shaw* was so acquainted, but the contrary. Defendants allege further, that *Sir Richard Bonnycastle*, who was in charge of the department in Kingston, suspected the plaintiff of tampering with a clerk in the department, and disapproved of what he considered to much intimacy between the plaintiff and Mr. *Shaw*; that *Sir Richard*, with whom the acceptance or refusal of tenders in effect rested, determined, in consequence of what he conceived to be the improper conduct of the plaintiff, that he, the plaintiff, should get no contract; and that this determination of *Sir Richard* was known to the plaintiff when he negotiated with the defendants in January, 1846, in relation to the proposed partnership.

The questions thus raised are—was the plaintiff guilty of tampering with a clerk, or other misconduct which should have excluded him from getting a contract. It is not proved that he was so guilty. Next, did any circumstances exist which amounted to an exclusion of the plaintiff from a contract, or which affected the chance which, equally with others, he would otherwise have had of getting a contract, arising from the opinion entertained by *Sir Richard* of his conduct; and if so did the plaintiff know, or had he reason to believe that difficulties existed in the way of his getting a contract, which did not exist in regard to others. If such difficulties

did exist, and plaintiff knew or had reason to believe that they did exist, then his not communicating his knowledge or belief in the matter was, in my opinion, a suppression of a very material fact affecting the proposed partnership, and nothing less than a fraud upon the parties with whom he was dealing, which would avoid the contract into which they entered.

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Allan.

Upon the evidence, I think it appears that such difficulties did exist; that *Sir Richard Bonnycastle* thought, perhaps groundlessly, that the plaintiff had tampered or attempted to tamper with a clerk in the department; that he had attempted, by undue means, to obtain knowledge of matters connected with the proposed works, which he had no right to know; that his conduct in the matter was such as ought to exclude him from a contract, and I think it appears that he had determined not to recommend him for one. The evidence of *Samuel Shaw*, a clerk in the Engineer Department, before referred to, is very strong upon this point, and it is indirectly confirmed by the evidence of other witnesses. Whether the existence of these difficulties was known to the plaintiff is another question. I think he must have been aware that he was, to use a common expression, in bad odour with *Sir Richard*. *Sir Richard* spoke to him about his intimacy with Mr. *Shaw*; said it was improper and would draw down animadversion, or something worse. When he applied to *Sir Richard* to see the approximate estimates, *Sir Richard* indignantly, as Mr. *Harper* says, refused him. *Sir Richard* found fault with Mr. *Shaw* for his too great intimacy with the plaintiff. Mr. *Shaw*, in his evidence, speaks as if a strong dislike, as if even bitter feelings were entertained by *Sir Richard* against the plaintiff. Whether *Shaw* communicated to the plaintiff that *Sir Richard* had found fault with him for his intimacy with the plaintiff, or that he entertained unfriendly feelings towards him, or that in his opinion

Judgment.

1851. he would not recommend him for a contract, does not appear. It may be that the plaintiff was aware of the existence of an unfriendly feeling on the part of *Sir Richard*, and suspected that it might operate to his exclusion from a contract; or it may be that, innocent of all improper conduct, he felt that he ought not to be excluded, or his position as a tenderer at all affected, and therefore did not believe that any difficulties did exist in the way of his getting a contract.

Huggart
v.
Allan.

Judgment.

I do not think the evidence is strong enough to bring home to the plaintiff either knowledge or belief that difficulties of the nature adverted to did exist in the way of his getting a contract. But still, as a matter of fact, such difficulties did exist; whether, if they had not existed he could have got a contract is not known, but he was virtually much in the same position as if he had not tendered at all. He was, unknown to himself as I take it, in effect, a disqualified person; and it may be a question whether, such being his position, the agreement for a partnership entered into between the defendants and himself is thereby affected.

It may be said, that the parties entering into such an agreement took the risk of that, but I should think it would be considered that they all assumed that each was in a position to do what each was to do—viz, tender for the proposed works. Now, a tender from a disqualified person was in effect no tender, within the meaning of the parties, for they understood of course a tender which might be accepted. Their purpose was to get three contracts if they could; that was one of the objects of the partnership, and one of the considerations for entering into it. Had defendants known, that by reason of the plaintiff's disqualification his tender was in effect a blank, it may be concluded that they would not have con-

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tracted with him. They did contract with him in the belief and on the assumption that the three stood in the same position, and that each could contribute in the same way to the common interest. This belief and assumption were unreal. The plaintiff labored under a disability unknown to all of them, which necessarily disappointed one leading object of the partnership. He now claims, notwithstanding this, the rights of a partner; he committed no fraud; he concealed nothing—for it could be no concealment not to disclose that which he did not know; he was guilty of no wrong. But granting this, is it just that he should be admitted to participate in advantages to the obtaining of which he was not in a position to contribute? It was supposed that each had the same chance of obtaining a contract. Thus *Allan* would be as likely to share in the profits of a contract obtained by the plaintiff, as the plaintiff would in a contract obtained by *Allan*, and so with *Matthews*. Judgment.

It was, in fact, just as reasonable as if each of the three had already obtained an equally profitable contract. But if one of the parties was in such a position that he could not get a contract, then the reasonableness of the arrangement fails; that which might have accrued to the benefit of all through the instrumentality of one cannot so accrue, because that one is in a position that prevents it.

Suppose three persons were to agree to join together in the purchase of three lottery tickets, each to contribute the price of one ticket, and the three to share equally in any prizes that might be drawn; that the three sums were sent to an agent to purchase tickets; that the money contributed by one was in bad or say in uncurrent money, so that two tickets only were purchased, and these two obtained prizes; and suppose it ascertained which of the three parties furnished the bad or uncurrent money, but yet that it was quite certain that he believed it to be good; I

1851. think it clear that the one who furnished the bad or uncurrent money could claim no share in the prizes. And I do not see that the case I have supposed, and which I put by way of illustration, is in principle distinguishable from the position of the parties here, so far at least as that part of their agreement went which related to their all putting in tenders. I do not lose sight of what was further contemplated—their being partners in profit and loss afterwards; but I cannot assume that they would have entered into the agreement which they did if they had not believed that they all stood the like chance of obtaining contracts.

Haggart
v.
Allan.

Judgment.

There are some principles of law which I think are applicable to this point. Mr. *Chitty*, in his work on contracts, at p. 57, lays down this principle, "a promise is not binding if the consideration for making it be of such a nature that it was not, in fact or law, in the power of the promisee, from whom such consideration moved, to complete such consideration and confer the full benefit meant to be derived therefrom—at least, if the performance of the act would not have been justifiable." In this case, the plaintiff is the promisee; the consideration moving from him, and on which the promise was made, was his chance, equally with theirs, to tender and get a contract; this consideration he was unable to complete; an obstacle existed which disabled him from conferring the full benefit meant to be derived therefrom. The case put by Mr. *Chitty* supposes the consideration to be such that it was not, in law or fact, in the power of the party to perform it; and perhaps that it was not justifiable. But if the principle be, that the other party could not derive the full benefit meant to be derived from the performance of that which was the consideration of his promise, and therefore that his promise would not be binding, then it stands upon the same principle as this case.

In the case of *Nerot v. Wallace*, (a) Lord *Kenyon* 1851.
 in giving judgment said: "The ground on which
 I found my judgment is this, that every person
 who in consideration of some advantage, either to
 himself or to another, promises a benefit, must have
 the power of conferring that benefit up to the extent
 to which that benefit professes to go, and that not
 only in fact but in law." Here the advantage to
 the plaintiff was the chance of the defendants' getting
 contracts, the benefit to the defendants the like chance
 in respect of the plaintiff—this chance clearly under-
 stood if not expressed; and there was, I conceive, an
 implied promise on the part of each of a benefit to
 the other, viz: the chance of getting a contract. This
 benefit promised by the plaintiff did not exist. It
 was necessary that it should exist, so that he on his
 part should have the power of conferring that benefit
 up to the extent to which that benefit professes to go;
 at least, such I understand to have been the relative
 position of the parties. Judgment.

Haggart
 v.
 Allan.

The law in relation to the dissolution of partner-
 ship in consequence of the incapacity or disability
 of partners may throw some light upon this point.
 Mr. Justice *Story* in alluding to a dissolution for
 causes (b) "independent of any blame, laches or im-
 propriety of conduct necessarily attached to any of
 the partners," says, "it will be a sufficient ground
 to decree a dissolution that there exists an impracti-
 cability in carrying on the undertaking for which the
 partnership was formed: this may take place from
 the inability of one or all of the parties from carrying
 into effect the terms of the original contract," or, &c.,
 from other causes which he enumerates. He says
 further (c), "that a partnership may be dissolved on
 account of the inability or incapacity of one partner to
 contribute his skill, labor and diligence in the promo-

(a) 3 T. R. 17. (b) *Story on Partnership*, S. 290. (c) S. 291.

1851. tion and accomplishment of the objects of the partnership."

Haggart
v.
Allan.

Mr. *Story* is of course alluding to partnerships which have been commenced and carried on, and to an inability or incapacity occurring afterwards; but I apprehend that his remarks apply with equal force to the position of the parties here. The plaintiff was, (say without any blame or impropriety of conduct,) in a position which disabled him from carrying into effect the terms of the original contract, which incapacitated him from contributing what he was to have contributed in the formation and accomplishment of the objects of the partnership.

Judgment.

My view upon this point is shortly this: the three parties considered a partnership desirable, as they could, as they conceived, work to more advantage in quarrying and otherwise together, than if they were alone; they desired to get three contracts if they could; they associated themselves together in the belief and upon the assumption that they were all upon an equal footing. If any one of the three was in effect disqualified, they could not get three contracts, and their chance was proportionably diminished of getting two; the plaintiff being in effect disqualified, he had a benefit, without a corresponding benefit to the defendants, the mutual benefit being a main ingredient in the reason and consideration of the agreement.

The consideration that I have given to this point has induced me to incline to the opinion, that the plaintiff being in effect disqualified from obtaining a contract, his position differed so essentially from what the defendants, and himself also, assumed it to be, that the agreement for a partnership entered into by the defendants is not binding upon them. I am however by no means free from doubt upon the point; and my brother *Esten*, taking a different view upon

it, leads me to distrust my own opinion. I think the plaintiff's bill should be dismissed, but without costs; without costs, for this reason among others, that the answers of the defendants are disingenuous and unsatisfactory.

1851.

Haggart
v.
Allan.

I believe my brother *Esten* is of opinion that in case the plaintiff should desire a reference to the Master, to enquire and state as to the cause of the delay in filing the bill, such reference ought to be directed. In this I concur. Where the question is, whether the bill should be dismissed because of the delay in filing it, or the plaintiff afforded an opportunity of explaining that delay, I think the leaning of the court should be, to afford to the plaintiff the opportunity for such explanation.

ESTEN, V. C.—This is a bill for an account in relation to an alleged partnership in the execution of certain public works at the town of Kingston. As my brother *Spragge* has entered into a very full detail of the facts of the case in his judgment, it is unnecessary for me to do so. I think the evidence in the cause coupled with the answers, which strongly corroborate in many respects the plaintiff's statement, and produce an unfavorable impression with regard to the defendants' case, sufficient to warrant an issue for the purpose of determining whether a complete agreement was concluded between the plaintiff and defendants, as stated in the bill, or whether all that passed on the subject was mere negotiation and treaty, as asserted in the answer. It appears to me, however, that the plaintiff has failed to exercise that promptitude in the assertion of his claims which the nature and circumstances of the case demanded at his hands. I think that when the defendants excluded him from their undertaking in the manner represented in the bill he should have instantly commenced proceedings for the assertion of his rights. He would then have

Judgment.

1851. appeared in the light of a person willing to share either in the profit or loss of the adventure, according to the event, and not of a person who waited to see what the event would be before he declared his views. He may, however, be able to explain this apparent neglect, to which I think his attention has not been properly called by the answer, and may have an enquiry, if he desire it, for this purpose; if not, I think the bill should be dismissed without costs. If the plaintiff shall desire it, refer it to the Master to inquire and state whether any circumstances had occurred excusing the omission of the plaintiff to file his bill in this Court at any earlier date than the same was filed, for the establishment of the alleged partnership, upon his exclusion by the defendants, as stated in his bill, and reserve further directions and costs. If the plaintiff shall not desire such reference, dismiss the bill without costs.

Judgment.

Haggart
v.
Allan.

APPLEGARTH V. BAKER.

Practice—Amendment—Costs—13th Order of 1850.

Where a motion is made to amend the bill, under the 13th of the Orders of May, 1850, a draft of the proposed amendments must be laid before the Court upon the application, but it need not be set out in the notice of motion.

The plaintiff, upon making such a motion, will be required to satisfy the Court, first, of the truth of the proposed amendment; and, secondly, of the propriety and expediency, with a view to the ends of justice, of permitting the amendment under all the circumstances, and at the particular stage of the cause.

With respect to the costs of motions to amend under the 13th Order of May, 1850, no general rule can be laid down, each case must depend upon its particular circumstances.

September 2
& October 3.

Statement.

Argument.

This was a motion to amend the plaintiff's bill, after the time for doing so under an order of course, and after the bill had been amended under such an order.

Mr. *Macara*, for the plaintiff.

Mr. *Mowat*, for the defendant.

October 3.

THE CHANCELLOR. — This is an application to amend the bill, after answer, and after the time

allowed for amendments under an order of course, but before replication. The answer to the amended bill was filed on the 15th of last July, and the present application came on immediately after vacation. 1851.

Applegarth
v.
Baker.

The plaintiff swears, that the facts which he seeks to state by way of amendment, the truth of which he verifies, were first introduced into the record by the answer to the amended bill; that they are there introduced in a way inconsistent with the truth of the case; and that the desired amendments are material and necessary, in his belief, to his interests.

No affidavit has been filed on the other side. The plaintiff's allegations must, therefore, be taken to be true; and, assuming them to be so, it is obvious, we think, that this is not a case to refuse leave to amend; and having perused the proposed amendments, we think them warranted by the affidavit, and think the plaintiff is therefore entitled to succeed upon the motion. Judgment.

But although this case be, upon its circumstances, free from difficulty, it is proper that we should refer to two points, raised in argument, of considerable importance to the general practice of the Court: first, as to the form; and, secondly, as to the costs of these applications.

In framing the order of May, 1850, it was our intention unquestionably to enlarge, in some respects, the power of amendment. With respect to one class of amendments, technical difficulties were found to exist, owing to the period of the application. With respect to certain other classes of amendment, it was thought expedient to substitute a power of amendment in lieu of other more dilatory and expensive modes of procedure theretofore in use.

But, although it was thought right to enable the

1851. Court to overcome all merely technical difficulties to amendment, at any stage of a cause, it was by no means intended to place in the hands of the plaintiff an uncontrolled power of amendment, found liable by experience to such serious abuse (a). The new orders will be found, consequently, more stringent in some respects than the orders at present in force in England. The 13th Order of May, 1850, requires the plaintiff, *in all cases*, to satisfy the court—first, of the truth of the amendment; and, secondly, of its propriety and expediency to the ends of justice, under all the circumstances, at the particular stage of the cause. Of the first requisite it is unnecessary to speak. No general rule can be laid down as to the second. It may involve the consideration not only of the facts material to the litigation, but of all the surrounding circumstances of the case. It involves, necessarily, the facts of the proposed amendment; but it may also be materially affected by the time of the application, and by the conduct of the parties, both plaintiff and defendant.

Judgment.

In considering the practical regulations necessary to give effect to the 13th of the orders of May, 1850, we have been impressed, on the one hand, with the necessity of maintaining an effectual check upon applications of this sort; and, on the other hand, with the importance of avoiding, as far as possible, unnecessary expense.

With a view to the first object, we think that the draft of the proposed amendment must be laid before the Court upon the application. But it need not be set out in the notice of motion. The production of the amended draft, upon the hearing of the motion will, in our opinion, be sufficient to enable the parties to discuss, and the Court to dispose of the application.

(a) *Wilmott v. Boulton*, ante Vol. I., p. 479.

With respect to the costs in these cases, it is impossible to lay down any general rule. Applications of this kind may be so proper, and so necessary, as to make it obviously fitting that the costs should be costs in the cause. On the contrary it may become necessary to modify that result by visiting with costs either the party applying, or the party opposing the application. Each case must depend upon its particular circumstances.

1851.
Applegarth
v.
Baker.

Here, we think that the costs should be costs in the cause.

ROBERTSON V. MEYERS.

Practice—Decree—Set Off.

Where the decree in a cause directs sums of money to be paid reciprocally by the parties, but is silent as to setting off one sum against the other, that object cannot afterwards be attained upon motion; to do so, the cause must be re-heard.

The decree made in this cause directed certain sums of money to be paid by the defendant to the plaintiff, as also certain other sums from the plaintiff to defendant; and that the defendant should pay to the plaintiff his costs of the suit as between solicitor and client, in terms, on payment of certain moneys directed to be paid by the plaintiff to the defendant.

Sept'r 23 &
October 3.

Statement

On taking the accounts in the Master's office, the plaintiff was proved to be indebted to the defendant to a large amount, notwithstanding which the plaintiff refused to allow the costs taxed to him to be set off against that sum, and had proceeded by subpoena to enforce payment of his costs.

Mr. Turner, for the defendant, now moved that an order might be made, directing the Master to deduct the costs taxed to the plaintiff from the sum proved due by him to the defendant, citing 1 *Smith's*

Argument

1851. Chancery Practice 694. Unless this course is allowed to be taken, the plaintiff will be enabled to receive a large sum from the defendant for costs, while at the same time the defendant has a claim greatly exceeding the amount of those costs against the plaintiff, to recover which the defendant will be left to his personal remedy against the plaintiff, who is insolvent.

Robertson
v.
Meyers.

Mr. *McDonald*, for the plaintiff, submitted that the motion could not be granted, as it amounts to a varying of the decrees made in the cause, and which could only be effected by having the cause re-heard.

October 3.
Judgment.

ESTEN, V. C.*—The decree in this case referred it to the Master to enquire what the defendant had paid for a certain judgment against the plaintiff, obtained by other parties and assigned to the defendant, and what the plaintiff had paid in respect of it; and if the sums so paid should equal what was paid for the judgment by the defendant, he should enter satisfaction on the roll; if not, the plaintiff was to pay the balance with interest. The decree also directed the Master to inquire what consideration the defendant had paid for the assignment of a certain agreement made by the plaintiff with other parties; and if it should appear that the defendant had paid less than the value of the agreement, he was declared a trustee of it for the plaintiff; but if he had paid the full value of the agreement, then the Master was to inquire what remained due in respect of the agreement, and the agreement was to be specifically performed; and the decree proceeds to direct that upon payment by the plaintiff of what remained due under it, the defendant should pay to the plaintiff the costs of the suit up to the hearing,

* The Chancellor was concerned in the cause while at the bar, and *Spragge*, V.C., had not heard the argument.

as between solicitor and client. The Master found 1851.
 that the defendant had paid for the judgment con-
 siderably less than was due upon it, and that the
 consequent deduction from the balance, which had
 appeared on the settlement between the parties to be
 due from the plaintiff to the defendant, reduced that
 balance to about 77*l.*, which, with the interest on it
 to the date of the report, amounted to the sum of about
 100*l.*, and that nothing had been paid by the plaintiff
 to the defendants towards the satisfaction of the judg-
 ment. The Master also found that the defendant had
 paid 300*l.* for the assignment of the agreement, which
 has been mentioned, and that the sum of 91*l.* or
 thereabout remained due under it, upon which he
 computed interest to the date of his report. The
 cause was then heard on further directions; upon
 which occasion the plaintiff was ordered to pay the
 defendant the sum due upon the judgment within
 fourteen days after service of that order; and the
 plaintiff not insisting that less than the real value had
 been paid for the assignment of the agreement, it
 was referred to the Master to ascertain more particu-
 larly what remained due by virtue of it, and the
 plaintiff was directed to pay the amount which
 should be found due, and to deliver certain deeds, &c.,
 within fourteen days after service of that order and
 of the report; and the defendant was directed to
 perform the agreement on his part. The present
 application is for an order that the costs payable by
 the defendant to the plaintiff under the original decree
 may be deducted from the sums directed by that
 decree, and the decree on further directions to be
 paid by the plaintiff to the defendant. The applica-
 tion raised the simple question, whether, when the
 decree has directed the payment of sums of money
 by the parties to each other reciprocally, but has not
 directed any set-off as to those sums, this object may
 be attained by an order to be made on motion with-
 out a re-hearing. It is observable that two opportu-

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nities had occurred of directing what is now sought, and that on neither occasion had it been asked for or ordered. It may, I think, be conceded, that if what is now sought had been asked for at the original hearing it would have been directed, as it seems clear that the solicitor's lien is only upon the balance remaining due after all proper off-sets have been made. As to sums reciprocally due between the parties. When the matter was first mentioned the application seemed to me to be a reasonable one, nor did it strike me at the time that it could be assimilated to a variation of the decree. Upon referring to the authorities, it seems clear that, previously to the case of *Shine v. Gough* (a), a mere clerical mistake in a decree, arising from an accidental slip or omission, would be amended on motion or petition but that if the proposed alteration exceeded these limits a re-hearing was necessary, although what was sought would have been granted had it been asked at the hearing or sought upon an application to rectify the minutes (b).

Judgment.

In the case of *Shine v. Gough*, an application was made for the purpose of effecting a set-off of costs at law and equity, not directed by the decree. The only objection made had reference to the effect of this proceeding upon the solicitor's lien; and *Lord Mannors*, considering that the claim of the solicitor offered no obstacle to the proposed arrangement, although he thought that in strictness a re-hearing was necessary, made the order. This decision occurred in 1811, and in 1822 a similar application was made in the case of *Rumney v. Beale* (c), the latest case to which I have been referred, except that the costs, between which it was attempted in this

(a) 2 B. & B. 33. (b) *Taylor v. Popham*, 15 Ves. 72; *Fell v. Lutteridge*, Barn. 319; *Harmer v. Harris*, 1 Russ. 155; *Wallis v. Thomas*, 7 Ves. 292; *Pickard v. Matheson*, id. 293; *Wallis v. Parkinson*, 3 Leo. 233; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Colman v. Sarrell*, 2 Cox. 206. (c) 10 Pri. 113.

case to effect a set-off, were altogether in the equity suit. It was objected that the application came too late after the decree had been passed and acted upon, and the motion was refused without costs. Mr. Daniel considers that these two judgments are to be reconciled by the fact that in *Shene v. Gough* the objection was not taken, whereas in *Rumney v. Beale* it was. It seems clear, therefore, that before the general order of 1828, relating to the correction of clerical errors in decrees, a re-hearing was necessary in order to obtain a set-off as to sums reciprocally due between the parties, if such set-off had not been provided for by the decree. The only question then is, whether the general order of 1828 has made any difference in this respect, and I do not think it has. It does not appear to me that the omission, which it is the object of this application to remedy, can be regarded as a clerical mistake within the meaning of this order, and therefore I think that the motion must be refused with costs. This is predicated upon the decree directing that the agreement which has been mentioned was to be specifically performed by the defendant upon payment to him by the plaintiff of what should appear to remain due under it, which perhaps is the proper construction of the decree; but supposing it to be interpreted according to the letter, directing that on payment by the plaintiff to the defendant of what remained due under the agreement, the defendant should pay to the plaintiff the cost of the suit as between the solicitor and client, then this application is wholly unnecessary, and the result must be the same; for in this case the plaintiff cannot demand his costs until he has paid what is due under the agreement; in other words, the decree in effect orders, as to this amount, the very set-off which it is the object of the application to obtain. The proceeding up stairs makes no difference in the result upon this construction of the decree; because, if by means of that proceeding the money due under the

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1851. agreement has been paid, the costs ought to be paid; if not, the plaintiff must pay what remains due under the agreement before he can claim his costs. I have already said that my impression is against this construction of the decree.

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SAUNDERSON V. CANTON.

Practice—Final Foreclosure.

October 3. It is not necessary for the mortgagee to remain at the place appointed
and by the Master's report during all the time limited for the payment of
Sept'r 19. the mortgage money; his attendance so early as to allow a reasonable time for payment of the mortgage money before the expiration of the hour named will be sufficient.

Statement. This was a motion for the final order of foreclosure.

The affidavit of the plaintiff stated that he had attended at the place named in the Master's report for *about* half an hour before the expiration of the time appointed for the payment of the amount found due, and negatived the payment of the money.

Argument. Mr. *Mowat*, for the plaintiff, now moved for the final order of foreclosure, referring to *Scott v. Saunders (a)*, and an anonymous case in 1 *Collyer's Reports* 273 as authorities to shew that the plaintiff was not bound to be present either in person or by attorney during the whole of the two hours limited by the report for the payment of the money.

October 3. THE CHANCELLOR.—The plaintiff moved for the
Judgment. final order of foreclosure, not upon the ordinary affidavit of attendance during the period specified in the order *nisi*, but upon an attendance for about the last half hour of that period.

Scott v. Saunders, and the anonymous case in 1 *Collyer* 273 were cited.

Those cases are not altogether satisfactory. The order, properly construed, would seem to allow the

mortgagor the entire time specified for payment; and therefore to debar a mortgagee, who may have rendered payment impossible during any part of that period, from obtaining his final order.

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Causton.

The cases cited, however, seem to have proceeded upon the principle that the time is fixed for the convenience of both, and that it is therefore the duty of both to await its expiration. Upon this construction, the attendance of the mortgagee so early as to allow a reasonable time for payment of the mortgage money before the expiration of the time limited would be sufficient.

This seems to us to be a reasonable view of the position of the parties. Its adoption cannot, we think, work injustice, and will have the effect of obviating the inconvenience arising from such an accidental omission as occurred here.

Upon this ground, and upon the authority cited, we think the plaintiff's affidavit sufficient, and that he is entitled to the order absolute.

HOWCUTT V. REES.

Practice—Enlarging publication.

Quære—Whether, upon an application by the plaintiff for a stay of proceedings to which the court considered him not entitled, an enlargement of publication can be ordered, when an order in that form would partially accomplish what the plaintiff desired by his motion.

Quære also—Whether the court would enlarge publication so as to enable a plaintiff to be present at the *visa voce* examination of the defendant, where such examination had been postponed by an accident, of which the defendant or his solicitor was the unintentional cause, till after the plaintiff's departure from the province on pressing business, and the plaintiff swore that it was necessary for his interests that he should be present.

Mr. McDonald for the plaintiff.

Argument.

Mr. Gwynne, Q. C., for the defendant.

ESTEN, V. C.*—In this case, the defendant's examination, pursuant to appointment, was prevented

* The Chancellor had been concerned in the case while at the bar.

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Judgment.

by the defendant's indisposition. This obstacle having been removed, and the examination having been commenced and having proceeded for some time, it was stopped by the inability of the defendant to produce a map or plan, which was mentioned in the course of his examination, and the production of which seemed necessary for its effectual prosecution. A future day was appointed for continuing the examination, and producing the map or plan, for which the defendant was in the meantime to make a search; but the plaintiff being, as he alleged, under the necessity of proceeding forthwith to England, obtained from the Court leave to apply, upon notice upon the day appointed for resuming the examination, in case the map or plan should not then be produced, for an order staying proceedings in the suit, and prohibiting any disturbance of the plaintiff's possession of the property in question during the plaintiff's absence. When the day arrived, the map was not produced, and the plaintiff made the motion of which he had given notice. This was granted in part only. The Court refused an injunction in terms of the notice, because it was not prayed by the bill, but granted an injunction in terms of the prayer of the bill, which it considered within the terms of the notice; it refused, however, to stay the proceedings in the suit, because, independently of other reasons which it was unnecessary to consider, it was not alleged that it was necessary for the protection of the plaintiff's interests. This application is now renewed upon an allegation of that nature. The grounds upon which it rests are, that the plaintiff has exerted all proper diligence in the prosecution of the suit; that he has been prevented from examining the defendant, first by his indisposition, then by his default; that he could not proceed with his examination without being personally present himself; that this was impossible by reason of his presence being required for some time in England; and that he

could not safely examine his witnesses without first examining the defendant. If these facts are true the court will enlarge publication, should it be necessary—in order to enable the plaintiff to complete the examination of the defendant and his witnesses; and as this is the more regular and usual course, and will not involve any restriction of the rights of the defendant, which should not be resorted to without absolute necessity, I think the present application should be refused, but under the circumstances, without costs, the defendant having by his neglect placed the plaintiff in a position in which it was not unreasonable for him in his anxiety to stand right with the court to make an application like the present, although the court does not think it necessary at present to interfere. Nothing that I have said is to be construed by the plaintiff into an encouragement to expect that publication will be enlarged in his favor; but if the case which he makes for the purpose of the present application is true, of which of course the Court would require to be clearly convinced, I think it would be proper to give him relief in this way, provided that no unreasonable delay should in the meantime have occurred.

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Rees.

Judgment.

SPRAGGE, V. C.—From what has been before the Court in this case, I can easily conceive that it may be material to the interest of the plaintiff that he should be present at the examination of the defendant, to suggest questions and give information to his council in relation to points arising upon such examination; and he has made affidavit that it is material to his rights in this suit that he should be so present. On the 19th of May last he made affidavit to the effect that urgent and important business required his presence in Europe, whither it was necessary that he should proceed immediately, and that he would be obliged to leave on the following day. He states, in the same affidavit that he had,

1851. *Howcutt v. Ross.* for three weeks previously, remained in Toronto solely for the purpose of being present at the examination of the defendant. He is now absent in England, and is to return to Toronto in November next, and he asks that proceedings (other than any that may be taken by consent) may be stayed in the meantime. The defendant opposes this, stating, among other things, that he himself contemplates visiting Europe in the course of the coming fall.

Judgment.

In disposing of this application, it is proper to remember that it has not been the fault of the plaintiff that the defendant has not been examined long ago. The seventh of May was appointed for his examination; it was postponed to the ninth on account of his alleged illness, and on that day again postponed upon affidavits and medical certificates of his inability, from illness, to attend; the plaintiff then gave notice of a motion for the postponement of the examination till his return from England, when the defendant attended Court to undergo his examination; a difficulty *then* occurred in consequence of the defendant not producing a map, in relation to which the defendant desired to examine him; this map he stated he had placed in the hands of his solicitor, who was then absent at or in the neighborhood of Woodstock; search was made for it in the solicitor's office but with no result; some progress was made with the examination of the defendant, but without the map it could not be completed—this was on the twentieth of May last, the day on which the plaintiff was to leave for England, and on which I believe he actually did leave; the examination was broken off, and the map was on that day discovered by the clerk of the defendant's solicitor, who proposed that the examination should be resumed on the following day, the day *after* that on which the plaintiff was to leave Toronto.

The examination of the defendant in the presence

of the plaintiff was thus defeated. The map thus mislaid and discovered *ought* to have been brought in, on the order for the production of books and papers, obtained on the twentieth of March last. The inopportune illness of the defendant occurring on the eve of the plaintiff's departure for England was, of course, the defendant's misfortune, but nevertheless an obstacle which defeated his intended examination in the presence of the plaintiff. The absence of the map was the defendant's wrong; and first by the one cause and then by the other, that has been prevented which the plaintiff has sworn to be, and which there is reason to believe really is, material to his rights in this suit.

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The defendant complains of the delay as tying up the property in question, which he says prevents his disposing of adjoining property, as he is desirous of doing. I think the delay is not to be laid at the plaintiff's door. Under all the circumstances, I think it would not be just to the plaintiff that he should be in effect forced to proceed in his suit by the examination of the defendant or his witnesses at a disadvantage.

Judgment.

In his present application he perhaps asks too much, as, if granted in the terms in which it is asked, it would postpone the examination of the defendant's witnesses as well as the plaintiff's. The defendant, however, makes no objection on this score.

The application might certainly have been in another shape—viz., to enlarge publication; but it is not made upon grounds upon which such applications are ordinarily made; and in asking in direct terms for that which he desires, and thus drawing to it the defendant's attention, I cannot think that he is wrong.

It would be premature to give any opinion now, as to what course it would be proper to adopt in the

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Howe
Rees.

event of the defendant leaving the province before the plaintiff has an opportunity of being present at his examination. I will only say, that I think it cannot be doubted that neither ought the defendant to gain anything nor the plaintiff to lose anything by the failure which has occurred to have an effectual examination of the defendant.

Judgment.

I confess, I think it would be proper to grant so much of the plaintiff's application as relates to the defendant's examination and the examination of the plaintiff's own witnesses. If for this purpose an enlargement of publication should be necessary, as it probably will be, he will be under the necessity of making such application.

FRASER V. SUTHERLAND.

Confidential communications—Valuable consideration—Parties.

June 10 and
October 2.

The communications from a debtor to his solicitor in reference to a compromise which the debtor desired his solicitor to effect with his creditors, and on which communications the solicitor acted and at length effected the compromise, are not privileged, and the solicitor's evidence of them is admissible.

Where a debtor, in order to effect a compromise with his creditors, offered a mortgage on certain property, which property he represented as belonging to another person, who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that, before it was executed, the debtor had obtained a conveyance of the property to himself: *Held*, that such conveyance was, under the circumstances, subject to the mortgage.

A mortgage to creditors, to secure their debts, is a sufficient valuable consideration to give a prior registered conveyance precedence over a conveyance previously executed, but registered subsequently.

To a bill of foreclosure brought by the trustees to whom the mortgage had been executed for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties.

Statement.

The bill, in this case, was filed on the 10th day of July, 1850, by *Douglas Fraser, Malcolm Cameron and John Young*—trustees of the late firm of *Farish, Sons and Company*—*Aneas S. Kennedy, George Fiskin, Archibald Kerr and Thomas C. Kerr*, who sued as well on their own behalf as on behalf of all others, the creditors of *John McDonald*, enumerated in the indenture of mortgage mentioned

in the said bill, and who should come in, seek relief by, and contribute to, the expenses of the suit, and stated, that by an indenture dated the 31st day of March 1847, made between *James Sutherland* (the defendant) of the one part, and the said *Douglas Fraser*, as trustee for certain individuals and co-partnerships setting forth their names, (about nineteen in number,) and the other plaintiff's of the other part; certain premises therein mentioned and described were conveyed to the said *Douglas Fraser* in TRUST for the said persons and partnership firms, subject to redemption on payment by *McDonald*, to the said parties of their demands against him. Default in payment was then alleged, and a decree of foreclosure prayed against the defendant *Sutherland*.

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Sutherland.

On the 8th of November following *Sutherland* put in his answer, admitting the execution of the mortgage, the granting to *McDonald* thereupon of time for payment of the sums secured to his said creditors, and stated that "he hath parted with all his interest in the said mortgaged premises to the said *John McDonald*, and this defendant hath not and doth not pretend to have or claim any title, estate or interest in the said mortgaged premises."

Judgment.

The plaintiff, on *Sutherland's* answer coming in, amended his bill, by making *McDonald* a party, setting forth the fact of a conveyance to *McDonald*, but which although executed previously was not registered until after the deed of trust, and charging that *McDonald* was bound by the conveyance executed by *Sutherland*.

Mr. *Crickmore* for the defendant, *McDonald*.— This, although termed by the plaintiff a creditor's suit, in reality is a suit of foreclosure, and submitted that all the creditors ought to have been made parties, citing *Michie v. Charles (a)*, *Forsythe v. Drake (b)*.

Argument.

(a) Ante Vol. p. 125. (b) Ib. 223.

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Mr. *Read* for the plaintiff. The rule, I submit is, that if a trustee file a bill, he may do so on behalf of himself and all those for whom he has been appointed to act in that capacity; but if he is proceeded against, then the creditors must be brought before the Court.—*Bateman v. Margerison* (a), *Lamb v. Bradstock* (b). Again, the question of the practicability of bringing parties before the Court is always to be decided by the Court.—*Weld v. Bonham* (c), *Cockburn v. Thompson* (d). The defendant himself shows how unwise it would have been to have made all the creditors parties, for, in his answer, he states that the greater portion of them had been already paid their claims.

Argument.

Another objection was taken by Mr. *Crickmore*, as to the admissibility of the evidence of Mr. *D. Fraser*, who had been acting as attorney in effecting an arrangement with *McDonald's* creditors. This point, however, is fully stated in the judgment.—*Hills v. Nash* (e), *Jones v. Pugh* (f), *Lyster v. Turner* (g), *Weeks v. Argent* (h), *Griffith v. Davies* (i), *Hibbert v. Knight* (j), were also cited.

Mr. *Crickmore* also referred to *Doe Cronk v. Smith* (k) and *Neeson v. Eastwood* (l), to shew that even admitting the evidence of *Fraser*, the nature of which is also set forth in the judgment, there was not sufficient to postpone *McDonald's* claim, so as to let in plaintiff's mortgage.

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Judgment.

THE CHANCELLOR.—In this foreclosure suit, *Sutherland* had been, originally, the sole defendant. His answer alleged that he had conveyed the estate to one *McDonald* prior to the mortgage which is the foundation of the present suit, and disclaimed, in consequence all interest in the premises.

(a) 6 Hare 496. (b) 7 Beav. 500. (c) 2 S. & S. 91. (d) 16 Ves. 321. (e) 1 Ph. 594. (f) 1b. 96. (g) 10 Jurist 751. (h) 16 M. & W. 817. (i) 5 B. & Ad. 500. (j) 2 Exch. R. 11. (k) 7 U. C. Q. B. R. 376. (l) 4 U. C. Q. B. R. 271.

The bill was then amended by making *McDonald* 1851.
a party.

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The amended bill asserts the plaintiff's title to a decree, notwithstanding the conveyance to *McDonald*, on two grounds—first, because, the premises being subject to the operation of the registry laws, the mortgage deed had been registered prior to the conveyance to *McDonald*; secondly, because the mortgage had been executed at the instance of *McDonald* and for his benefit.

Upon the argument, the learned counsel for the defendants relied upon the conveyance to *McDonald* as a bar to the relief sought by the bill; he argued that the registry laws did not apply, this mortgage not having been executed "for a valuable consideration," as he contended, within the meaning of those acts; he objected to *Fraser's* testimony as inadmissible, and also that the suit was imperfect for want of parties. Judgment.

We think this evidence clearly admissible. The defendant, *McDonald*, being in difficulty, as it appears, and absent from this province, employed Mr. *Fraser* as his solicitor to negotiate a compromise with his creditors. All their communications were by letter. *McDonald*, after some ineffectual proposals which we need not notice, made a definite proposition to pay a specified sum by certain instalments, and to procure his friend *Sutherland* (the other defendant,) to secure the due fulfilment of those terms, by mortgage of real estate. The defendant now objects to his solicitor giving evidence of the communications, which are, as he contends, privileged.

This objection seems to us plainly untenable. These communications, whether we regard their nature, the purpose of their communication, or what

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has taken place in accordance with that purpose, are altogether wanting in that confidential character which would entitle them to be held as privileged. *McDonald*, having himself considered and determined the proposal which it would be for his advantage to make, communicates that proposal to his solicitor, not for the purpose of advice or modification, but in order that it might be submitted, in its then shape, to his creditors. The terms so proposed had been already divulged by the solicitor in accordance with the instructions of his client; they were submitted to his creditors, accepted by them, and have been acted on ever since. Communications of such a character, made for such a purpose, and so dealt with, cannot, without manifest confusion, be termed confidential (*a*).

Judgment.

The evidence being admissible, then, it is perfectly plain that this defence wholly fails. *McDonald* proposes to secure the debts of his various creditors by a mortgage of the premises in question in the cause, to be executed by the other defendant (*Sutherland*), to whom, according to the registry, they appeared to belong, although *McDonald* himself was, in fact, at the period in question, the owner in fee, this proposal is accepted; the creditors sign the letter of license; and *Sutherland* executes the mortgage in question. But, the period of payment having arrived, the creditors, seeking to avail themselves of this security, are met by *McDonald* in a way which, if successful, would be a disgrace to the administration of justice in this court. He says, you cannot prevail, for at the time that I succeeded in inducing you to accept of the security—the full benefit of which I have received—*Sutherland* had, in truth, no title; I was myself at that period, and am still the

(a) *Griffith v. Davis*, 5 B. & Ad. 502; *Weeks v. Argent*, 16 M. & W. 817.

owner in fee, and your deed is, for that reason, mere waste paper. Whatever may have been the intention of these parties originally, this defence cannot be characterised as other than a flagrant attempt to perpetrate a very gross fraud. Were there no authority it would be our duty to make a precedent in such a case; but there is no want of authority. The law applicable to the case is well settled. It has been said, that a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction (*a*).

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We need not now enquire whether that proposition can be maintained in all its extent (*b*); because, here, not only was *McDonald* privy to the fact of *Sutherland* dealing with the property as his own, but such dealing was at his instance and for his benefit. Under such circumstances, the conclusion is undeniable. It is perfectly clear that *McDonald* cannot be permitted to avail himself of such a defence.

Judgment.

It is unnecessary to determine the question upon the registry acts; although, as at present advised, we entertain no doubt that upon that point also the plaintiffs are entitled to succeed.

As to the objection for want of parties, we think the plaintiffs entitled to succeed. The sole object of this proceeding is to realize the trust fund. The suit might have been sustained by the trustee alone (*c*).

(*a*) *Nicholson v. Hooper*, 4 M. & C. 179; *Hammersly v. Baron de Biel*, 12 C. & F. 62. (*b*) *Freeman v. Cook*, 2 Ex. Rep. 654. (*c*) *Franco v. Franco*, 3 Ves. 75; *Mitford* 201, (5th Ed.); *May v. Selby*, 1 Y. & C. C. C. 235.

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WILSON V. RICHARDSON.

*Award—Injunction.*Sept'r 12 &
October 3.

This Court will relieve against an award made between partners in ignorance, on the part of the arbitrators and of the remaining partners, that important transactions had not been entered by the other, the managing partner, in the books of the firm, in consequence of which omission the award had been to a corresponding amount too favorable to such managing partner. An injunction to restrain proceedings on a judgment recovered at law upon an award alleged to have been made under these circumstances, was continued to the hearing, in a case in which the ultimate success of the plaintiffs at the hearing was not considered as wholly free from question; the amount of the judgment being ordered into court.

Statement.

The bill, in this case, was filed by *John Wilson* and *David J. Hughes*, against *Hugh Richardson*; and from the statements thereof, as well as of the answer and affidavits filed on this motion, it appeared that these gentlemen had been carrying on business as attorneys and solicitors, at *London* and *Woodstock*, the business at the latter place being under the sole management of the defendant—at the former it was conducted by the plaintiffs together; that circumstances having arisen which rendered a dissolution of the partnership as between the plaintiffs and defendant desirable, the plaintiff *Hughes* insisted on its being immediately effected; that an arbitration was agreed upon, and the arbitrators' award made in a few hours, although the defendant alleged his inability to make up a proper statement of the affairs on so short a notice; that, after the making of the award, plaintiffs paid part of the sum awarded, but refused to pay any more, having as they alleged, discovered that the defendant had received several sums not entered in the books of the partnership, and which, had they been duly entered, would have led to the arbitrators making their award for so much less in favor of the defendant; that the defendant, in consequence of such refusal, had commenced proceedings at law, in which action the plaintiffs (here) had pleaded several pleas, none however impugning the award on the grounds set forth in the bill; that

a verdict had been rendered in that action in favor of the defendant, for the sum due on the award; whereupon the plaintiffs instituted the present suit. 1851.
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v.
Richardson

The bill prayed, amongst other things, an injunction to restrain proceedings at law; and the common injunction had been obtained for want of answer. Statement.

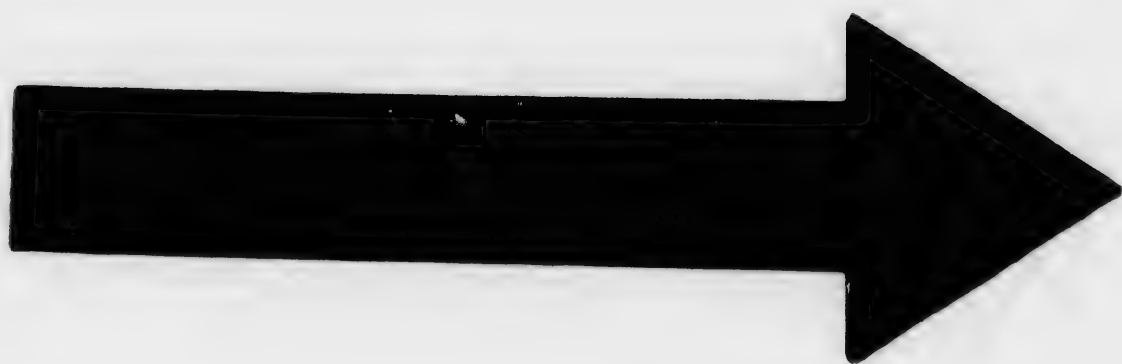
The defendant, having answered, now moved to dissolve the injunction which had been so obtained,

Mr. Hagarty Q. C. and Mr. Galt, for the defendant.

Although the facts now set forth by the bill were known by the plaintiffs before pleading to the action at law, and would, if true, have afforded a defence there as well as in this court, still they were not pleaded, and this Court, in such a case, would only act in favor of the plaintiffs by affording them a discovery of the true state of the facts, in order to aid in their defence at law; *Peel v. Kingsmill* (a) is an authority for this position. They also objected that the plaintiffs had been guilty of laches in not filing their bill until after a verdict had been obtained. Argument.

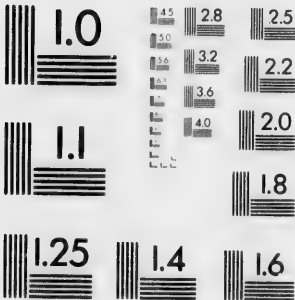
Mr. Mowat for the plaintiffs.—Lapse of time has not been raised by the answer and cannot now be taken advantage of; besides the bill alleges that the discovery had been only recently made, which is a sufficient statement when not contradicted by the defendant—*Gartside v. Gartside* (b); and here the defendant does not venture to allege even a belief that the information was obtained earlier. He also cited *The South Sea Company v. Bumstead* (c), *Mitchell v. Harris* (d), *Metcalf v. Ives* (e), *Spencer v. Spencer* (f).

(a) Ante Vol. I., p. 584. (b) 3 Anst. 735. (c) 2 Eq. Ca. Ab. 80. (d) 2 Ves. Jun. 135. (e) 1 Atk. 63. (f) 2 Y. & Jer. 249.



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1851. THE CHANCELLOR.—The bill in this case asks that an award between the parties may be varied or set aside, and that the defendant's proceedings thereon at law may be enjoined.

Wilson
v.
Richardson.
October 3.

The common injunction was obtained, and this motion to dissolve it comes before us upon the answer and several affidavits.

It appears that the plaintiffs and defendant, having been engaged together in partnership as attornies and solicitors, on the 9th of June, 1849, agreed to a dissolution, the terms of which were referred to the arbitration of Messrs. *Horton* and *McQueen*.

On the same day, the arbitrators made their award, by which they directed that the assets of the late firm should be received, and its liabilities paid by the plaintiffs; and they awarded to the defendant the sum of 575*l*.

Judgment.

This award is now impeached on the ground of fraud. It is asserted that the defendant, who had been the managing partner, had been in the habit of receiving partnership moneys and applying them to his own use, without having made any entries thereof in the partnership books. It is said that the moneys so misapplied amounted, at the date of the award, to the sum of 160*l*. or more; and that the fact having been improperly concealed from the arbitrators, by the defendant, the award had been rendered, by that means, unfavorable to the plaintiffs to that extent.

The statement in the bill upon this subject is in these words, "That there were divers particulars in relation to the co-partnership affairs, of which the defendant had not, up to the time of making the said award, made any entry in the partnership books, and which, on the contrary, he designedly concealed from

the arbitrators and from the plaintiffs, and the plaintiffs were ignorant of such particulars until long after making the said award, and after the paying of such sums as plaintiffs have paid thereon, nor had the plaintiffs any means of ascertaining the same at any earlier period, and they have in fact only discovered the same very recently."

1851.

Wilson
v.
Richardson.

"That by reason of the premises, the said particulars were not by the said arbitrators taken into account in any way, or charged against defendant, as they would have been had the arbitrators been aware of the same."

"That the said particulars consisted chiefly of divers sums of money due and owing to the co-partnership, and which had been received by the defendant and applied to his own use before the said dissolution, besides divers other things; all which particulars, so far as yet known by plaintiffs, are set forth in the schedule hereto annexed marked with the letter A." Judgment.

The items enumerated in the schedule—excluding the balance of cash as well as the sum due to Messrs. *Crawford* and *Hugarty*—are; I think, 23 in number, and have reference to a great variety of transactions.

Besides the affidavits of the plaintiffs in verification of this bill, we have before us depositions of the arbitrators also.

Mr. *Horton*, in his second deposition, swears, "As defendant who had the management of the Woodstock business alleged the impossibility of taking a correct account and making a precise estimate of the amount of business done, and also of balancing the partnership books, without delay being afforded to him for that purpose, *defendant having also stated*

1851. *that there were some recent items of cash of trifling amount that he had not had time to make proper entries of, &c.*" In his third affidavit, Mr. *Horton* says, "That at the time of making the award, the said *Richardson* exhibited a schedule shewing what, in his view, the business was worth, and what he claimed, and what he had received out of the business; that, in making the award, the deponent and his co-arbitrator assumed that the accounts had been correctly kept, and that all monies received by the said *Richardson* had been entered truly in the books of the co-partnership; that deponent took a hasty view of the books, more with the intention of seeing what the business was worth than anything else, and took for granted that what the said *Richardson* had charged himself with was all the money he was or would be chargeable with, excepting any trifling sums, in the shape of errors, which might occur in the management of such a business."

Judgment.

Mr. *McQueen's* first affidavit contains a passage substantially the same as the one first extracted from Mr. *Horton's* evidence; and, in the close, there is this passage, "that, at the time of the arbitration, he assumed and considered that all entries of cash in the books between the parties were correctly kept, with the exception of some trifling costs which defendant had received in lumber, and the exact amount of which he was not at the time of said arbitration—as he then expressed himself—ready or in a situation to give."

In his second deposition, he says, "that, in making up the amount to be awarded to the defendant, deponent and *Horton* assumed the account of defendant in the ledger of the partnership to be correct, excepting as to any small omissions that might have occurred in the management of the business; that if deponent and *Horton* had known that defendant had

received any money other than appeared in that 1851.
 account, the award would have been made for just WILSON
 so much less as any sum or sums he might have v.
 received." Richardson.

Now, assuming for a moment the truth of those allegations in the bill and affidavits, it cannot be doubted, I apprehend, that a sufficient ground has been laid for equitable relief. These gentlemen dissolve a partnership which had subsisted for some short period, and they at the same time refer it to arbitrators to settle the amount to be paid to the defendant on his retirement from the firm. The defendant—to whom the entire management of the business had been committed—having failed to enter the partnership dealings correctly, having appropriated to his own use partnership moneys to a considerable amount, not debited in his account, conceals this fact from the arbitrators. In ignorance of this fact—known to the defendant alone—a sum of money is awarded to him, larger by one-quarter than would have been awarded had the fact so concealed been disclosed. There is no rule, I apprehend, which would justify us in holding an award, so obtained, binding (*a*).

Judgment.

I do not mean to state these facts as conclusions which I should be prepared to draw from the whole evidence. I speak of the case as it is represented by the plaintiffs, and the course it would be our duty to pursue in the absence of countervailing testimony.

Let us now look to the answer and see how far it displaces the case I have just stated. The only passage in the answer—and we have not been presented with any affidavits on behalf of the defendant—is in these words, "Denies that he did *designedly*

(*a*) South Sea Co. v. Bumstead, 3 Vin. Ab. 140; Gartside v. Gartside, 3 Anst. 735; Ives v. Metcalfe, 1 Atk. 63.

1851. *conceal* from the arbitrators, or from the plaintiffs, or
 Wilson either of them, that there were any particulars in
 v. relation to the co-partnership affairs which the defend-
 Richardson. ant had not, up to the time of making the said
 award, made any entry in the co-partnership books; for defendant saith, if any such entries had been omitted—which defendant doth not admit—the same arose entirely from time not having been given to him to make up the said accounts, the said agreement for dissolution and reference having been proposed, drawn, and executed on the 9th of June, 1849, and the said reference having been proceeded with and completed, and the said award prepared by or about noon on the same day."

Judgment. Now, the first observation that arises upon this passage is, that it leaves the principal allegation in the bill unanswered, if not confessed. It is alleged that he had appropriated to his own use partnership moneys to a large amount, without having made any entry in the books of the firm. That is not denied. It is not even ignored. The defendant contents himself with saying "he does not admit it." When it is recollected that the schedule to the bill has furnished a statement of the alleged intromissions—I do not allude to the former communications, although they have, in my opinion, an important bearing upon this point—but, the bill having furnished accurate information, the defendant, under the circumstances of the case and for the purpose of the present motion, must be taken, I think, to have admitted what he has not even ignored.

Again, it is sworn by the arbitrators that the defendant had represented his own account as accurate, with the exception of some trifling omissions, and that they had acted upon that representation. This is not denied, and must therefore be assumed to be true.

Then, the sole allegation upon which the defence rests is, that the defendant "did not designedly conceal" the matter alleged. The precise meaning of the expression is somewhat obscure. He does not swear that he was then ignorant of, or had forgotten, the fact of his having appropriated partnership moneys without entry. He certainly did not communicate that fact. And if, knowing the fact, he failed to communicate it, that would be such a *suppressio veri* as would, under the cases, invalidate the award. But, assuming this passage to mean that the defendant had forgotten those facts, would that constitute an answer to the bill? Can the defendant be permitted to take advantage of his own wrong? A considerable sum of money has been awarded to him in consequence of the partnership books having been in a condition in which they would not have been had he discharged his duty to his co-partners faithfully—can he be permitted to retain that advantage? 1851.
Wilson
v.
Richardson.
Judgment.

The answer, indeed, sets up something like a waiver of an examination of the accounts, and asserts that the defendant yielded the point only at the pressing instance of the plaintiffs. To some extent this allegation is quite consistent with the other evidence. The matter was pressed forward with a degree of haste not quite consistent, as it would seem, with the ends of justice. And the defendant's request for delay, in order that he might be enabled to make up the books, has a strong tendency to rebut any inference of moral wrong. But that there was any intention of making an award without regard to the defendant's statement of the sums he had drawn, is not, we think, established. The arbitrators have denied it. How could it have been, in the nature of the thing? What basis would there have been for any settlement?

It must not be forgotten, moreover, that the defen-

1851. Wilson
v.
Richardson. dant had taken a somewhat different view of the matter in his letter of the 3rd of March, from that now presented by his answer. He then said that the arbitrators had deducted a large amount in consequence of the sums omitted to be entered. But that has been altogether denied by the arbitrators.

Judgment. Upon the whole case, it would be improper, we think, to permit the money to be levied without further investigation. We have not overlooked the questions of law raised upon the argument. They may be found, hereafter, to interpose difficulties in the way of the plaintiff's recovering. Neither are we insensible to the difficulty of the defendant's position, owing to the undue haste with which the arbitration was conducted, and the length of time that has elapsed. The argument of the learned counsel for the defendant, arising upon the form of some of the affidavits now before us, is certainly entitled to great weight. There is room for the inference that, at the hearing, these facts may be presented in an entirely different light. But this motion must be decided upon the evidence now before us; and, upon that evidence,—without questioning the truth of the answer, and without imputing to the defendant any moral wrong,—it is quite impossible to say that a case has not been made for further investigation. That these parties have it in their own power to conduct that investigation more satisfactorily, and with greater certainty of arriving at the truth, than can be attained by any court of justice, is not to be doubted. Judging from the spirit of candor and justice which pervades the correspondence laid before us, we hope that that course may yet be adopted. But, upon the case as it now stands before us, the injunction must be continued to the hearing; upon payment into Court of the amount of the judgment.

WATERS v. SHADE.

1851.

Possession—Registration—Sheriff's deed—Notice—Sale of reversion—Equity of redemption.

The possession of an estate by the first, but unregistered, purchaser May 6, 7 & 9, from a registered owner, is not of itself notice to a subsequent pur. & October 3. chaser of the title of such first purchaser.

The prior registration of a sheriff's deed gives the sheriff's vendee priority over an antecedent but unregistered deed, just as the prior registration of a deed from the party himself would do.

Held also, by Esten and Spragge, V. CC., that the purchaser at sheriff's sale of a reversion in land mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit

The facts of this case are clearly set forth in the judgment pronounced by his Honor *V. C. Esten*.

Dr. Connor, Q. C., and Mr. McDonald, for the Argument.
plaintiff.

Mr. Vankoughnet, Q. C., and Mr. Mowat, for the
defendants.

For the plaintiff it was contended, that the evidence shewed that the deed to *Waters* was executed in 1819, and that then, or subsequently thereto, he was in possession; therefore, it was impossible that the writ against lands could affect the 100 acres conveyed to plaintiff.

The statute of 5 George II. only gives to the creditor a remedy against the lands of the debtor, in the same manner as a bond or judgment affects lands in England. The sheriff, it was contended, had not any power to sell the land claimed by plaintiff on an execution against *McMahon*, who had previously sold it. The question then arises, as to what effect the registry of the sheriff's deed before the deed to plaintiff would have. Under the Registry Act a power is left in the vendor, not any estate, but no power is thus given to the sheriff to sell, nor does a second vendee with notice of a prior deed gain any title by having his deed first registered. *Brennan v. O'Neil*, (a) may be referred to as establishing the

(a) 4 U. C. Q. B. R. 8.

1851. validity of *Shade's* title to those lands, but certainly the case is extremely difficult to reconcile with any idea of justice or equity. The Registry Act, we submit, was intended for the protection of innocent vendees against the frauds of vendors, but could never be meant to give to a public officer the right to commit a gross fraud.

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[*Esten*, V. C.—Fraud does not necessarily enter into every case. Suppose, for instance, an heir-at-law, without any knowledge of a previous transfer by his ancestor, conveying in good faith to a purchaser without notice and for value, and the purchaser putting his deed on record before the vendee of the ancestor, in that case it is clear, no estate descended to the heir, and yet it is equally clear his vendee would be entitled to hold.]

Fury v. Smith (a) is a direct authority in favor of plaintiff. It is there stated that the assignee in law of a party cannot make a subsequent title, and the very case of a sheriff selling after a *bona fide* conveyance by the owner is given.

Argument.

If we are right in our view that the sheriff's deed conveyed nothing, and that his deed did not come within the operation of the Registry Acts, then plaintiff is in precisely the same position as if no such sale had ever taken place. If wrong, however, then notice is proved to have been given. True it is that *Shade* denies "to the best of his knowledge, remembrance and belief, that any such notice was given," but the witnesses examined on the part of the plaintiff, we submit, state facts sufficient to affect him with notice.

Corbett v. Barker (b); *Warburton v. Loveland* (c), *Strong v. Lewis* (d); *Doe Miller v. Tiffany* (e); *Titley v. Davies*, (f); *Barnes v. Racster*, (g); *Bugden v. Bignold*, (h), were also cited.

(a) Cited in 3 Sug. V. & P. 362, 10th Ed. (b) 3 Anst. 755. (c) 2 Dow. & C. 480. (d) Ante Vol. I., p. 443 (e) 5 U. C. Q. B. R. 79 (f) 2 Y. & C. 399. (g) 1 Y. & C. N. C. 401. (h) 2 Y. & C. 377.

They also contended that the purchase by *Shade* of the mortgage security that had been executed in favor of Mr. *St. George* placed *Shade* in the position of mortgagee and mortgagor. In that case plaintiff would be entitled to redeem the mortgage upon the whole estate, though only entitled to 100 acres, and to call upon *Shade* to recoup him out of the 112 acres, just as if the reversion had remained in *McMahon*.

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Shade.

For the defendants, it was contended, that so far as *Schnellinger* and *Butler* were concerned, they were purchasers for value without notice, and that as against them no relief could therefore be granted.

The case of *Fury v. Smith* cannot affect this case, for in Ireland sheriff's deeds cannot be registered. Now, our act embraces "all conveyances, &c., affecting any lands," and clearly a sheriff's deed affects lands.

Argument.

The case of *Warburton v. Loveland* is an authority in favor of the defendants; indeed, in that case one of the reasons of the appellant is precisely the point taken by the defendants here.

The act, we submit, was passed for the protection of purchasers, and it cannot make any difference that the title comes from the sheriff instead of from the debtor.

[*Esten*, V. C.—Could a purchaser at sheriff's sale plead that he was a purchaser for valuable consideration without notice?]

We submit that he could, unless the point has already been otherwise decided.

Doe Brennan v. O'Neil decides the point as to the effect given to a sheriff's deed by registry, and whatever opinion may be entertained by the other side as to the soundness of that opinion, it may be remarked

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1851. *Waters v. Shade.* that the decision in that case is law in the court of Queen's Bench, and this court will not be anxious to overrule that decision; indeed, any other decision than the one so came to would render the title acquired at sheriff's sales the most uncertain that could possibly be, and it may be well questioned if any person could be found who would be willing to invest any capital in the purchase of so uncertain an estate; it is but too well known, that even as the law is at present understood, sales by the sheriff seldom, if ever, produce anything like a proper amount.

Argument.

Doe dem. *Robinson v. Allsop*, (a) shews that *Shade's* title is good at law, notwithstanding he knew of the prior deed to *Waters*; assuming all the while that the sheriff's deed can be registered under our statute.

Wyatt v. Barwell (b), *Rancliffe v. Parkyns* (c), *Kennedy v. Daly* (d), *Pattison v. Hawkesworth* (e) were referred to. The other points relied on by counsel are mentioned in the judgment.

Judgment.

ESTEN, V. C.*—The facts of this case are as follow :—One *McMahon* was the owner in fee simple, of 312 acres of land in the township of Waterloo, in the then District of Gore, known as part of a tract of land called "Lower Beasley's Block." The title to this property was what is called an old registered one, when *McMahon* owned it, and before the circumstances which form the subject of the present suit occurred. *McMahon* sold and conveyed 100 acres of this property to one *Pennebecker*, who registered his deed in the year 1818. Another 100 acres *McMahon*, as is alleged, sold and conveyed to the plaintiff. The bill states this sale to have occurred in 1816, and that the conveyance was executed in 1819. The conveyance, however, was certainly not

(a) 5 B. & Al. 142. (b) 19 Ves. 435. (c) 6 Dow. 230. (d) Sch. & L. 379. (e) 10 Beav. 375.

* The Chancellor was concerned in the cause while at the bar.

registered until 8th July, 1823. In 1820, *McMahon* executed a mortgage of the whole 312 acres to one *St. George*, who registered his deed in the same year so that he acquired, as is contended, priority over the plaintiff *Waters* to the extent of his interest, which was a term of 1,000 years. It is not suggested that *St. George* had any notice of the plaintiff's deed or contract; and therefore, if this position be correct, the plaintiff's 100 acres were no doubt well charged with this security, although the plaintiff would have been entitled to call upon *McMahon* to discharge them from it. The reversion in fee, however, of these 100 acres, remained in the plaintiff. *Pennebecker's* 100 acres were not affected by this mortgage, although it comprised them in terms, as he had taken the precaution of registering his conveyance before the mortgage was executed. The plaintiff appears to have remained in possession. In 1821 the defendant *Shade* obtained a judgment against *McMahon*, and having sued out a *fiery facias* against his lands in the District of Gore, the sheriff of that district seized, and on the 7th July, 1823, sold to the defendant *Shade* the 212 acres which *McMahon* retained after the sale to *Pennebecker*, consisting of the 100 acres sold to the plaintiff, and the 112 acres which remained unsold. It is probable, as the defendant *Shade* asserts, that the register was examined, and that the sheriff intended to seize and sell all that appeared not to have been alienated. The purchase money paid by *Shade* for the 212 acres was 17l. 10s. 0d., apparently not above one-ninth of its value. The sheriff's deed was dated the 7th of July, 1823, and it was registered at half-past nine on the next morning, three-quarters of an hour before the plaintiff's deed, of which however the memorial was dated the 21st December, 1820. In 1825 *Shade* procured from the executor of *St. George* an assignment of the mortgage for 1,000 years, and afterwards commenced an action of ejectment against the plaintiff to recover the possession of the 100 acres

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v.
Shade.

Judgment.

1851. in his possession; obtained a verdict, and in 1829 executed a writ of *habere facias possessionem*, whereby he obtained the possession of the 100 acres; since which time he and the defendant *Butler*, who claims this part of the property under him, have remained in possession of it, while the remainder of the 212 acres, purchased by *Shade* at the sheriff's sale, has been, ever since such purchase, respectively in the possession of *Shade* and the other defendant *Schnellinger*, who purchased this portion of the property from *Shade*. The possession of *Shade* appears to have been a merely legal one, not attended with any profitable use of the property, which was in fact vacant and unoccupied, but *Butler* and *Schellinger* entered into the actual possession of their respective portions of the property, and made improvements upon them respectively. During this time *Waters* appears to have resided in the vicinity of the land, and must have been aware of all that was done with respect to it. The bill was filed within twenty years from the time that *Shade* entered into possession of the 100 acres claimed by the plaintiff. Its general object is the recovery of the estate, but the claim of the plaintiff is presented under a variety of aspects, and relief is prayed in different shapes, according to the view which the court might take of the respective rights of the parties.

Judgment.

Among the points urged by the plaintiff, it was insisted that the mortgage to *St. George*, and also the sheriff's sale and deed, were, so far as regarded the plaintiff's 100 acres, absolutely void, and were not sustained by the prior registration of those instruments. This proposition seemed to be based on the facts of *McMahon* being out of possession of the 100 acres when he made the mortgage, and when the sheriff's sale took place; and several cases were cited which had been decided on the principle that where the land is held adversely to the real owner, any

alienation that he may attempt to make of it will be ineffectual. 1851.

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These cases, I think, have no application to the present question. It is undoubtedly true, that where the possession of land is held adversely to the real owner he cannot make any effectual alienation of it; at least he could not have done so at the time when these transactions occurred; but the reason was that his estate was turned into a mere right, which, by the policy of the common law, was not transferable. But in the case of a sale and conveyance of land first to one person, and then to another who first registers his conveyance, the estate of the grantor at the time of the execution of the second conveyance, has not been converted into a mere right—he has no right at all—and the subsequent conveyance is *per se* wholly void, and is made good only by the Register Act, which is a great innovation upon the common law, and which avoids the prior conveyance as, in the contemplation of the law, fraudulent against the subsequent purchaser; the consequence of which is, that at the time of the execution of the second conveyance the grantor is in the event deemed to have had the absolute fee-simple of the estate.

Judgment.

It was, however, contended by the learned counsel for the plaintiff, that where the prior purchaser is in possession of the land at the time of the execution of the second conveyance, the title must be deemed to be a pretended one; and so the subsequent sale and conveyance are void, under the statute relating to pretended titles. The learned counsel argued that the Register Act makes the subsequent sale and conveyance good only in cases where but for the previous sale and conveyance it would be good; and that where it is void for any other reason, the Register Act does not help it.

I agree in the principle enunciated by the learned

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counsel, but not in its application to the cases imply of possession accompanying the prior conveyance. In such a case, the possession being under and consequent upon the sale and conveyance, is part and the perfection of it; and it may be truly said that, but for the previous sale and conveyance, the subsequent sale and conveyance would be good. The Register Act in avoiding the prior deed avoids also the possession under it, and the grantor is in the event deemed to have been always in possession. In truth, the possession of the prior purchaser is in such case his possession, for he claims under him. A different construction would limit the operation of the Register Act to cases in which the vendor, after the sale and conveyance, remains in possession — an event which I suppose has scarcely ever occurred since the Register Act was passed. Such a construction would reduce the Register Act to a dead letter.

Judgment.

In truth, the case of the prior purchaser being in possession, is entirely within the policy of the act. A court of equity, and of course a court of law, holds that a purchaser of land is not imperatively called upon to require the production of the title deeds, nor to visit the land for the purpose of seeing who is in possession of it; but that if he deals with the person who appears by the register to be the owner of it, accepts his assurance that he is the owner and in possession, paying his money and receiving a conveyance upon that supposition, he is an innocent purchaser, and of course to be protected against a person, who by neglecting to register his deed has misled him. This ground therefore, I consider equally untenable with the former. It appears to me, therefore, that the mortgage in this case was valid and effectual and took precedence of the plaintiff's deed.

The defendant's case, on the other hand, is, that by virtue of the sheriff's sale and the prior registra-

tion of the deed made in pursuance of it, the defendant *Shade* acquired the reversion of the 100 acres purchased by the plaintiff, expectant upon the determination of the term of 1000 years, with the right of redeeming that term, and that having procured an assignment of the mortgage without any notice of the plaintiff's title, he became absolutely entitled to the fee simple of the property, and transferred that estate to *Butler*, and that consequently the plaintiff has no equity to the relief prayed by his bill.

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If the principles upon which the defendants rest their case are correct, the consequence which they deduce from them will necessarily follow. If it is true that prior registration of a sheriff's deed gives it priority over a previous unregistered conveyance, and if it is true that the sale by the sheriff of a reversion expectant upon a mortgage-term carries with it the right to redeem that term; then, as it is not pretended that either *St. George* or *Butler*, or proved that *Shade*, had notice of the plaintiff's purchase or conveyance it will necessarily follow that their title will prevail over it.

Judgment.

The doctrine however, that a sheriff's conveyance acquired by means of prior registration a preference to a previous unregistered conveyance, was strongly contested in the argument of the case, and demands the most careful consideration. The learned counsel for the defendants contended that the point was not open to dispute, and cited the case of *Doe dem. Brennan v. O'Neil*, reported in the Upper Canada Reports, as settling the question in his clients' favor.

I have looked at this case, and it appears that the precise point arose in it, and was decided in the manner stated by the defendants' counsel. Our attention was likewise called to a case (a) decided

(a) *Fury v. Smith.*

1851. in the court of Queen's Bench in Ireland, in which it was represented that a different doctrine was held. I have not seen the report of this case but it is pretty fully stated in Mr. *Sugden's* book upon vendors and purchasers, and from his account it would seem that the Irish court was of opinion that the Register Act of Ireland operated only upon conveyances made by the same person, and that when the second conveyance is made by the assignee in law of the person who executed the first, the two deeds had effect according to the principles of the common law, and the Register Act did not apply. This general doctrine was overruled in a subsequent case (a) in the House of Lords, in which it was decided that a second conveyance, executed by the assignee in law of the person who made the first, and first registered, acquired priority under the Register Act; and for the general proposition enunciated in it, therefore, the Irish case is no authority; but the court likewise held, that this general doctrine was not required for the determination of that case, but that their judgment in it was referable to grounds peculiar to sheriff's deeds. I am at a loss to conceive what these are, unless they are those which were insisted upon by the plaintiff's counsel; and under these circumstances and in this state of the authorities, perhaps the point is open for our consideration, and we are at liberty to follow the bent of our opinion.

I have scarcely ever had occasion to consider a question, in regard to which the arguments on each side seemed to me so equally balanced. On the one hand it may be contended as follows—namely, the Register Act does not enlarge a deed beyond its true intent and meaning, but sustains it to the full extent of that true intent and meaning against any prior unregistered deed which clashes with it. But where a deed is expressed and intended to be subject and

(a) Warburton v. Loveland.

without prejudice to any other deed which may have preceded it, the former of these deeds cannot clash with the latter of them, because they are perfectly consistent with each other. Thus, for instance, where a second mortgage is made, reciting the first and expressly made subject to it, the prior registration of this second mortgage will not give it priority over the first. Now, a sheriff's deed professes to pass only such estate and interest as the debtor had at the time that the judgment attached upon his land. It is intended to pass only this estate and interest, and the sheriff has no power to convey any greater estate or interest. The sheriff has no estate to convey; he has only a power to transfer another man's estate, derived from the law, which cannot intend him to do a wrongful act, or to convey a greater estate than the debtor has, or in fact, an estate which does not belong to him but to another, and to subject one man's property to the payment of another man's debt. No two things, it may be urged, can be more different than a sheriff's sale and a private purchase. When a purchase is made by private contract, the purchaser intends and agrees to purchase the absolute fee simple of the property, and takes every precaution for the purpose of making sure that he gets it. He calls for the production of a perfectly good title, and if any defect is discovered he insists upon its removal; every incumbrance must be discharged, and should any come to light before the purchase money is paid, he is entitled to have them paid out of it. A purchaser at a private sale is held bound to make a fair and reasonable investigation of the title, and whatever would in the course of such an investigation be brought to light, he is presumed to have notice of. He is considered guilty of *crassa negligentia* if he fail to thoroughly investigate the title, and must abide the consequences of being deemed to have notice of every charge or incumbrance which in the progress of such an enquiry he would discover.

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This objection, it may be said, is a great security to third persons whose incumbrances or claims are of an equitable nature, for the purchaser is necessarily led, for the most part, in the course, of such an investigation, as he is deemed to have made to a knowledge of the existence of such rights, which would otherwise in the great majority of cases remain totally unknown to him.

Argument.

It may be then pointed out how differently is a sheriff's sale conducted. The purchaser at such a sale, it may be said, does not purchase, nor intend to purchase, the absolute fee simple of the property, but simply whatever estate the debtor has; it may be a fee simple or less, or no estate; it may be free from incumbrances, or incumbered to its full value; he is not entitled to call for the production of any title, nor is any title guaranteed to him. If he accidentally discover any defect in the title after his purchase, he cannot call upon the vendor to remove it, because he purchased such title as the vendor had. If any charges or incumbrances come to light before he has paid his purchase money, he cannot insist upon paying them out of it, for he has purchased subject to those incumbrances, and must pay his whole purchase money to the sheriff and discharge the incumbrances out of his own moneys, with such claim for indemnity (if any) as he may have against the judgment-debtor or his property. As on the one hand the sheriff can dispose only of the actual estate of the debtor, whatever it is, so on the other, whoever buys this estate, must pay the whole purchase money without deduction, for the satisfaction of the debt, the discharge of which is the object of the sale. The purchaser at sheriff's sale, in consequence, does not offer the full value of the land; he does not know what he is purchasing and offers only what he is willing to hazard; and the price fluctuates according to the means which exist,

or which every bidder individually has, previously to the sale of ascertaining the state of the title. As he has no means, or only very imperfect means of investigating the title, he cannot be held bound to do so, nor can he be deemed to have notice of equitable titles, which such an investigation would bring to light. To confer upon him the privileges of a purchaser for valuable consideration without notice, it may be contended, would be to consider him as a private purchaser for the sake of the advantages of a private sale, without subjecting him to its obligations, which should be their inseparable concomitant for the protection of third persons.

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From these considerations it is manifest, it may be said, that a purchaser at sheriff's sale stands in a very different position from a purchaser from any other assignee in law; and it is plain what the Irish court of Queen's Bench meant by saying that their judgment might be referred to grounds peculiar to sheriff's sales, without resorting to the general principle which they enunciated in that case, and which the House of Lords afterwards rejected. To hold that prior registration confers upon a sheriff's deed priority over a previous unregistered deed, would, it may be contended, be to hold that prior registration gives a more extensive operation to the instrument so registered, than it was intended to have. Such is not the intention of the Register Act; it was not meant to vary the intended operation of the deed registered, but to uphold it in its full extent according to the intention of the parties, against only any prior deed not registered. The judgment attaches upon any estate which the debtor at that moment has; this estate the law gives to the sheriff to dispose of for the satisfaction of the judgment. This estate, and this alone, it means him, and of course *he* means, to convey for this purpose; the purchaser must be deemed to have the same intention, and the Register

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1851. Act does not give to the deed any greater effect than it was intended by the parties to it to have.

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I cannot deny the force of these reasons, for I have found it very difficult to resist them; but after the best consideration that I have been able to give to the matter, and referring to the authorities which have been mentioned, and also the case cited in the argument of *Doe dem. Robinson v. Allsop*, where an assignment to a provisional assignee was held to be within the act, I think it best *stare decisis*, and to hold that the defendant by the prior registration of the deed under which he claims obtained priority over the plaintiff.

Judgment. The only question that remains is, whether the sheriff's sale in this instance transferred merely the dry reversion, leaving the right to redeem the term in the judgment-debtor, or whether that right accompanied the reversion as an incident, and vested, together with other rights of property incidental to the ownership of the reversion, in the purchaser.

The general question has already been discussed, both at the bar and on the bench, with so much learning and ability, that it is unnecessary for me to do more upon this occasion than to declare my views generally upon the subject, accompanying that declaration with one or two remarks pointed to those considerations which strike me as most forcibly illustrating the point in question.

After the best consideration which I have been able to give this question, it appears to me that the purchaser from the sheriff under a *fi. fa.* against lands of a reversion, expectant upon a mortgage-term, acquires with the reversion the right to redeem the term in common with the other incidents of ownership. The contrary conclusion proceeds upon the theory that when a mortgage is created for a term of years out of the fee, the right to redeem the term and

the reversion are distinct and separate estates, the one legal, and the other equitable, and as legal interests only can be affected by legal process, that the sheriff's sale transfers only the legal estate—that is, the reversion, leaving the right to redeem the mortgage-term in the debtor. This theory seems to me, with the utmost respect for the opposite opinion, erroneous. I think that when an owner in fee creates a mortgage-term, he vests in the mortgagee only such estate as it is necessary that he should have as a security, and that he retains all that he does not part with, as part of his old dominion—not split up into several interests, but as entire and indivisible as if he had created no mortgage at all. When a particular estate is carved out of the fee what remains in the owner of the fee is one entire estate. The effect of the disposition is merely to vest the particular estate in the person in whose favor it is created, not also to divide and split up the remainder of the estate, *Judgment.* which continues to reside in its owner, wholly unaffected by the disposition.

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Every owner of an estate, when he places a burden upon it must retain the right to discharge such burden; but this right is not a separate estate, distinct from the residue of the estate remaining after the burden is created, but a right of property, like the right to receive rent when land is demised for years with a reservation of rent. To hold the right to redeem the term and the reversion to be separate estates, is to ascribe to the mortgagor (which is certainly intended only to give an estate to the mortgagee) the operation not only of vesting an estate in him, but also of vesting a new estate in the mortgagor. The mortgage is a mere charge, and the equity of redemption, as it is called, is a mere right to relieve the estate of it, which must belong to every owner of the estate, and is a right of property merely, and not a distinct estate *per se*. When a mortgage

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in fee is created, the whole legal estate is vested in the mortgagee, and the mortgagor retains only an equitable estate, which is called an equity of redemption; but when a mortgage is created by the owner of the fee for a term of years, the mortgagor retains a legal estate, and he cannot have this estate and also an equitable chattel interest distinct from, but connected with, it. An equity of redemption upon a mortgage in fee subsists by itself, because the whole estate of the mortgagor has been converted into a mere equity; but after a mortgage for a term of years has been carved out of the fee, the estate of the mortgagor is not wholly equitable; he has a legal estate; and a legal and equitable estate cannot subsist in the same lands, at the same time, in the same person. If the right to redeem the term could be considered a separate estate, it could not subsist as such, but would merge in the legal inheritance, both as being a chattel interest, and also as being an equity. Every owner of lands in fee simple has a legal and beneficial estate, but they are inseparably united; because a legal and equitable interest in the same lands cannot exist at the same time in the same person; and the sheriff, when he sells and conveys the lands of this person, transfers both the legal and beneficial interest. Now, when a mortgage for years is carved out of this fee simple, the mortgagee takes nothing but a legal term of years, and a beneficial interest commensurate with his security. Whatever is not carved out of the estate must remain in the mortgagor; and therefore, the whole legal and equitable estate, excepting what has become vested in the mortgagee, remains in him, inseparably connected, just as before; for the mortgage, which only gives an estate to the mortgagee, can have no effect on the estate of the mortgagor, save to carve a portion out of it, leaving the remainder in *statu quo*. The right to redeem the term is just a portion of this beneficial interest.

Suppose a mortgage for 1,000 years to be paid off, and that the owner of the fee, instead of taking a release under the Register Act, were to have the term assigned to attend to inheritance, which is a very common transaction in England; the equitable interest in this term—that is, the right to the protection of the term—is a part of the beneficial ownership of the fee simple; and it would not, I suppose, be contended that this interest or right would not pass to the purchaser from the sheriff. This case is not, I think, distinguishable from that of the right to redeem the mortgage-term.

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Before widows became entitled to dower out of equitable estates, their rights were as strictly legal as possible. Certainly, a title of dower then would have affected an equitable estate as little as a writ of *fi. fa.*; and a third part of any equitable estate of the deceased husband would have as little passed to the widow as an entire equitable estate of a judgment-debtor to the purchaser from the sheriff. Accordingly, when a mortgage had been made in fee, the widow was not dowable, and the sheriff's vendee acquired nothing; but when the mortgage was for years, the widow was dowable of the reversion, and had a right to redeem the term as part of that estate. If the right to redeem the term had been a distinct equitable estate, joined indeed to the reversion, but so as to admit of separation by act of law, no part of it could have passed to the widow; but the same principle which carried it to the widow will carry it to the sheriff's vendee. The strongest argument, however, in favor of this view of the question, is derived from what I understand to be the law with regard to tenants by elegit. It may appear at first view, that when a mortgage has been made for years, a judgment-creditor of the mortgagor can redeem it, as he would a mortgage in fee. If I rightly understand the law on this subject, it is not so. Before a judgment-creditor

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can redeem, his judgment must attach upon the equity of redemption; but in the case supposed, there is no equity of redemption for his judgment to attach upon. His judgment attaches upon the reversion, which is the only estate that the debtor has; and he must issue his elegit and extend this reversion, before he can redeem the term; and then, having acquired an estate in the reversion, he can redeem the term like every other owner of the reversion, but he redeems as tenant by elegit, and not as a judgment-creditor. I am not alluding to the case where the estate of the mortgagor was originally a term of years, and he mortgages that term. In this case he has an equity of redemption only, upon which the judgment attaches so soon as the writ is delivered to the sheriff, and the judgment-creditor redeems as such. The case I refer to is that of the owner in fee creating a mortgage for years; and in this case, as I understand the law, the judgment-creditor cannot redeem, but the tenant by elegit may. This fact, if I have correctly stated the law upon this subject, conclusively negatives the existence of an equity of redemption upon a mortgage for years, made by the owner of the fee, as a separate estate from the rest of the inheritance.

In conclusion, upon this part of the case, I would observe upon the anomaly of an estate being at one time real and at another personal; devolving to the heir or devisee as real estate, and yet, if a sheriff's sale intervene, vesting thenceforth in the personal representative as personal estate. If the right to redeem the term is real estate, it must be a part of the inheritance, and should pass as such. It is not in the power of a sheriff's sale to split the inheritance into parts. The proposition which I advance is, that when a mortgage for years is created, the residue of the estate remaining in the mortgagor is one entire legal estate; for although it is partly legal and partly

equitable, like the estate of every owner of the entire fee-simple, yet these two sorts of ownership are so inseparably blended, as to constitute but one estate, and that a legal one which would pass under legal process to the purchaser from the sheriff.

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I need not remark upon the sound policy of this doctrine; for if the lands of a debtor are to be subjected to the payment of his debts through the medium of legal process, that end would be very much hindered by holding that the dry revision only passed, which in no such case could be worth more than five shillings. In fact, the creditor would be obliged, in addition, to institute a suit in this court to redeem the term, which, according to this theory, he could do, as upon the separation of the estates the equity of redemption would become a chattel interest, upon which the judgment would attach, so soon as the writ was delivered to the sheriff.

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I have read the case of *Lord Downie against Morris*, which does not appear to me to have much bearing on this question, but which, so far as it applies, is, I think, in favor of the defendants.

The result of the views which I have ventured to express upon this case is, that *St. George* having registered a valid mortgage without notice of the plaintiff's deed, became entitled to priority, and acquired a valid charge as the first incumbrancer upon the estate; that *Shade's* purchase at sheriff's sale, and prior registration of the sheriff's deed, vested in him the reversion, including the right of redemption in regard to the whole 212 acres; and that when *Shade* procured an assignment of the mortgage, it merged in the inheritance, and he became absolutely seised in fee. This estate he transferred respectively to *Butler* and *Schnellinger*, who it is not pretended had any notice of the plaintiff's rights. The evidence

1851. cannot be said to prove either notice or fraud in
Shade, and therefore the whole ground upon which
 the plaintiff bases his title to relief fails.

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I think the bill should be dismissed with costs.

SPRAGGE, V. C.—One of the leading questions in this case is, whether the Registry Act of Upper Canada, 35 Geo. III., chap. 5, applies to sheriffs' deeds of real estate sold by them under writs of *fiery facias*.

Judgment

Much of the reasoning against the application of the Registry Act to sheriffs' deeds is equally applicable to the case of a prior and subsequent deed from the same grantor. It is argued that after one makes a conveyance in fee simple, there remains in him no estate, but—as it is called in the case of *Fury v. Smith*—a power or possibility only; that if, after such conveyance, the same land be taken by the sheriff and sold in execution under *fiery facias* against the lands of the grantor, and a sheriff's deed be made thereupon to the purchaser, the sheriff's deed can only convey to the purchaser the estate and interest of the debtor; that the debtor had no estate or interest, and therefore nothing was conveyed.

The same is true of an ordinary subsequent deed. Where a deed is made by A. to B., and then a subsequent deed by A. to C.; after the deed to B. there remains in A. no estate or interest. When, therefore, he makes a deed to C. that deed conveys nothing, for A. had nothing to convey. C. then registers, (B. not having registered,) and the effect of the registration is to give vitality and effect to a deed which before was a conveyance of nothing. I will not venture the opinion, after what was said by the learned judges who decided *Fury v. Smith*, that no power or possibility known to the law could remain in a grantor after conveying his estate in fee simple;

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but I apprehend that upon the registration of the second deed the operation given to it by the act is, that the first deed is, as to it, void, as if never executed at all. Up to the time of registration the second deed conveyed nothing, because A. had previously conveyed his whole estate; but by the operation of the registry the previous deed became void, and so the second deed had effect as if no previous deed had ever been.

The statute provides that the first deed shall be adjudged fraudulent and void against a subsequent purchaser for valuable consideration. The purchaser at sheriff's sale is a purchaser for valuable consideration. It is said he is so only of the estate or interest which the execution debtor had at the time of the delivery of the writ to the sheriff, and that the sheriff's deed conveys and professes to convey such estate and interest only. But still, of whatever passes by the sheriff's deed he is a purchaser for valuable consideration; and the statute says that, as against such, the prior deed shall be adjudged fraudulent and void. If it be urged that the prior deed and the sheriff's deed may co-exist—the prior deed conveying the whole estate, and the sheriff's deed the estate and interest of the execution debtor, which might be a fee simple or might be nothing, according to what estate the execution debtor had, or whether he had any estate or interest, or none—then the point is narrowed to this, whether a purchaser of all *the estate and interest* of A. in certain land is to be held as purchasing the same thing as, or a different thing from, that certain land.

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A conveyance of all the estate and interest of A. in certain land to C., his heirs and assigns, is a conveyance of that land itself, if A. be seized of that land; it of itself imports an estate, and an estate of freehold as existing in the person whose estate is

1851. thereby conveyed. Suppose a conveyance by A. to B., his heirs and assigns, of certain land; then a conveyance by A. to C., his heirs and assigns, of the estate and interest of A. in the same lands for valuable consideration, and C. registers first. The second deed imports that A., at the time of making it, had in him a freehold estate in such lands to convey, and that he did convey it to a purchaser for valuable consideration; could this be said to be a conveyance of something other than what was conveyed to B.? Does it not negative the idea of the grantor having nothing to convey; of his having previously conveyed *all* his estate to another?

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A conveyance of all the estate and interests of the grantor, does not import that it is subject to any estate previously granted. It would be *unusual* in the case of an ordinary unofficial transfer, but still might be accounted for, *ex. gr.*, the grantor desiring not to warrant the title. In a deed from a sheriff it is the ordinary conveyance, and purports to convey all the estate of the execution debtor, even in fee if he had the fee; the operative words and the *habendum* are such as to convey a fee. I do not think such a deed can be construed as meaning to convey any estate or no estate at all, as it may happen. I take it that it assumes to convey an estate, and that in fee, but without warranting the title. It might be that the land was held by the execution debtor as entitled by descent, or by devise, but in truth having no title, the purchaser takes it subject to such contingency; but nevertheless the deed as much imports a conveyance of a fee as the title deed from an individual.

In the case of such a deed from an individual, duly registered, a prior deed, whether a conveyance in fee or of any lesser estate, would be void. If of a lesser estate, it might, with some show of reason,

be urged that the subsequent deed of the *estate and interest* of the grantor could only be subject to the estate he had carved out of it; but it would, under the statute, be void as a conveyance whereby the land comprised in the registered deed would be affected.

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As I read the statute, such a deed registered would not be subject to any prior unregistered deed, whether in fee or otherwise, and I cannot conceive that such a deed would import more than a deed in the like terms from a sheriff. In speaking of lesser estates, I of course except such as are for terms not exceeding twenty-one years, as provided for by the statute.

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With regard to the argument that a second deed in such terms may consist with a prior deed conveying the fee, I conceive that a deed in such terms falling within the words of the act, a prior purchaser, in order to exempt himself from the operation of the act, must shew that it does not apply because the second deed conveys something different from the first. It lies upon him to shew this. It is not sufficient to shew that the grantor, (or execution debtor, as the case may be), had nothing to be conveyed, for that he might shew where the second deed was in the same terms as to the first, and so might always defeat the statute; but he must shew that the second deed did not convey or import to convey the same thing; and if in its import and legal effect it was a conveyance of an estate in fee, it cannot be said to be a conveyance of a thing different from, or other than, a prior conveyance in fee.

Judgment

The sheriff's deed, in this case, purports to grant, bargain, sell, transfer, convey and confirm to the purchaser, his heirs and assigns, the lands therein described, being the 212 acres in question, together with the appurtenances, and the rents, issues and profits thereof, (in the usual terms,) and also all the

1851. estate, right, title, interest, &c., which *McMahon* had at the time of judgment entered (then considered as the time from which lands were bound), in so far as the sheriff might or could, or of right ought to grant, bargain and sell the same by virtue of the writ of *fi. fa.* therein recited, and subject to such incumbrances as are binding upon or might affect the same. I believe sheriff's deeds do not usually in terms convey the land, but merely the estate and interest of the execution debtor therein—this does both; but I have considered it as if in the usual form. The deed is of all the estate and interest which *McMahon* had at the time of judgment entered, in so far as the sheriff could, or of right ought to grant and convey the same by virtue of the *fi. fa.* This deed certainly conveyed nothing to the purchaser at sheriff's sale, for *McMahon* had no estate or interest at the time referred to. This was the case, though the fact did not appear. The purchaser registered his deed; he was a purchaser for valuable consideration; and as to such, a prior deed unregistered is fraudulent and void. It differs, I conceive, in no essential particular from a conveyance by an individual of all his estate and interest in certain land, which would be all the estate and interest which he then had in such lands. A purchaser in either case would buy subject in effect to any prior deed which might obtain prior registration; but, when he (such purchaser) registered, the prior deed was adjudged void, and if void then the grantor or execution debtor had an estate and interest in the land to convey at the time referred to. The sheriff conveying so far as he might or of right ought to do under the *fi. fa.*, falls under the same observation; the prior deed became void by the prior registration of the subsequent one, and so the sheriff could of right sell under the *fi. fa.*; his act, invalid and inoperative at the time, became valid by the subsequent registration. The sale, subject to incumbrances,

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was satisfied by the registered mortgage to *St. George*, 1851.
 or even if that had not existed there could be no
 valid incumbrance, at least by sale or mortgage
 unless registered before the sheriff's deed.

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The case of *Fury v. Smith*, which has been referred to, is an authority against the application of the Registry Act to sheriff's deeds. The learned judges who decided that case were of opinion that the statute was confined to cases where a prior and subsequent deed were given by the same grantor, excluding from its operation a second deed given by one claiming under the grantor of the prior deed. This latter point was not indeed the point of decision, but it shews how narrow a construction they gave to the Registry Act, a construction in that particular disapproved of by the House of Lords in *Warburton v. Loveland*. The point expressly decided does not appear, that I am aware of, to have since arisen in Ireland, or upon the English registry acts; but in a prior case—*Doe ex dem. Robinson v. Allsop*—a case upon the same principle, appears to have been decided upon the Middlesex Registry Act, which indeed bears a very close resemblance to our own. In that case, one *Stoddart*, a lessee for a long term of certain land in Middlesex, borrowed money of *Robinson*, and placed his lease in his hands; he afterwards assigned his term to one *Moore*; he became an insolvent debtor and was committed to prison; on obtaining his discharge he made an assignment of all his estate and effects to his provisional assignee; in his schedule the debt to *Robinson* appeared; the premises in question were also scheduled as assigned to *Moore*, and also as assigned or mortgaged to one *Greenwood* for a sum of 60*l.* *Moore* put up the premises to auction, and they were bought by one *Barton*, who assigned them to *Allsop*. The plaintiff, *Robinson*, who continued to hold the lease, purchased the bankrupt's estate and effects from the provisional

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1851. assignee, who made an assignment to him thereof. *Robinson* registered the original lease, the bankrupt's general assignment to the assignee and the assignee's assignment to himself. *Allsop* registered subsequently, and the assignment to him was held void against *Robinson*, who had obtained prior registration of his subsequent deed. The assignment to the assignee and the assignment from the assignee to the plaintiff were mere official transfers, and the schedule shewed upon its face that the bankrupt had parted with his term by prior assignment; yet, as the subsequent assignee was a purchaser for valuable consideration, the prior assignment was adjudged fraudulent and void against him. This case was decided by Lord *Tenterden* and Judges *Bayley* and *Best*, who unanimously held that the statute applied. Such assignments as formed the title of the plaintiff in that case can scarcely stand upon a more favorable footing than an ordinary sheriff's deed. In the case cited from our own Court of Queen's Bench—*Doe Brennan v. O'Neil*—the point for decision was whether the Upper Canada Registry Act applied to sheriff's deeds, and the Court held unanimously that the act did apply.

Judgment.

In the case of *Warburton v. Loveland* there is much that is applicable to the case before us. The language of the learned judges, whose opinion was delivered to the House of Lords, has much force as applied to our Registry Act. They say, speaking of the Irish Registry Act, "We think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed charges upon the estate. Now, it is obvious that no more effectual remedy can be desired than by requiring that every deed by which any interest in lands or tenements is transferred, or any charge created

thereon, shall be put upon the register, under the peril that if it is not found therein the subsequent purchaser for a valuable consideration, and without notice, shall gain the priority over the former conveyance, by the earlier registration of his subsequent deed."

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Again, speaking of the little consideration which a party is entitled to who does not register his prior deed, the same learned judges say, "What cause can be assigned for its non-appearance upon the register except either collusion with the grantor, or carelessness and neglect in himself, or mere accident. In neither case can he complain of the construction of the statute by which his own fraud, or his own want of due caution, or an accident which befel himself, is not allowed to operate to the prejudice of the right of the more diligent purchaser."

Judgment.

Taking the deed from *McMahon* to *Waters* to have been executed at the time that *Waters* himself states it to have been executed, about four years were allowed to elapse before it was registered. Had he observed caution, or anything like reasonable diligence, the difficulties which have occurred would have been avoided.

Our Registry Act would fail of its obvious intent in a great many instances, if it were held not to apply to sheriffs' deeds; for not only would the immediate purchaser be left unprotected, but all claiming under him for a series of years, until such time as adverse possession would constitute a title. Until that time no person would be safe from having his title defeated by some concealed deed. A deed may have been given in contemplation of the sheriff's sale; the vendee may lie by and see the property change hands again and again from one purchaser to another, even for full value, may see improvements made by those

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in possession wholly unsuspecting of the existence of an instrument which is quietly kept in the possession of the debtor's vendee, to be used whenever it may best serve his purpose; and this might continue for nineteen years, and at the expiration of that time a deed might be produced, the existence of which had never been known to but three or four persons, and the fruit of many years' labor and of honest purchase for value; the land with all its improvements, be transferred to the debtor's concealed vendee. It would be precisely the kind of mischief for which, as the judges said in *Warbarton v. Loveland*, the statute meant to afford an effectual remedy—a "mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed charges upon the estate."

Judgment.

And here, admitting that the application of our Registry Act to deeds by a sheriff is not perfectly clear, I will advert to the rule of construction adopted by the same learned judges in the case referred to, and which they take from *Huyden's* case, reported in 3 Report, p. 7:—

"1st, What was the common law before the making of the act?

"2nd, What was the mischief and defect for which the common law did not provide?

"3rd, What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? and

"4th, The true reason of the remedy? and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life

to the cure and remedy, according to the true intent 1851.
of the makers of the act, *pro bono publico*."

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v.
Shute.

The Registry Act of Upper Canada was wisely introduced in anticipation of apprehended evil, and was based upon the registry acts of England. At that time real estate was liable to be sold for the satisfaction of debts, as it is now; men in difficulties are more apt, as experience shews than others are to contrive evasions of the law. Whether foreseen or not by those who framed the Registry Act, it would, if held to apply to sheriff's deeds, be a very effectual check to concealed conveyance by execution debtors. It is in terms sufficiently comprehensive to embrace sheriff's deeds. I believe it has always been a general practice with purchasers at sheriff's sale to register their deeds just as they would register a deed from an individual; and it is well known how much the register is looked upon in Upper Canada as exhibiting the true state of the title, and it is no doubt the intent of the act that it should be so. To quote once more from the language of the judges in *Warburton v. Loveland*—they speak of the *leading object* of the act which they were discussing as being that, "as far as deeds were concerned, the register should give complete information; and that any necessity for looking further for deeds than into the register itself should be superseded;" and they add, "it is manifest that no construction of the act is so well calculated to carry into effect this, its avowed object, as that which forces all transfers and dispositions of any kind, and by whomsoever made, to be put upon the face of the register, so as to be open to the inspection of all parties who may at any time claim an interest therein." The case from which I have quoted is a very instructive one, and well worthy of the most attentive consideration.

Judgment.

I need hardly observe, that since the decision of

1851. *the case of Doe Brennan v. O'Neil* it has been looked upon as settled law in Upper Canada that the register act applies to sheriffs' deeds.

Waters
v.
Shade.

Upon the other points discussed in the judgment of my brother *Esten* I agree with him in opinion. Upon the point whether a sale by a sheriff of an equity of redemption expectant upon a mortgage for a term of years, by the owner of the fee simple, I expressed my opinion in *Chisholm v. Sheldon*; the views of my learned brother, and the reasoning by which they are enforced, confirm me in the opinion I gave in that case.

The case before us is one of hardship to the plaintiff, but I cannot acquit him of negligence in omitting to do that for about four years which is always looked upon, and by men in his class of life as well as by others, as necessary for securing and perfecting a title.

Judgment.

The sheriff's sale took place twenty-five years before he filed his bill, the trial of the ejectment nineteen years before, and at that trial he was zealously defended by two of the leading members of the bar, and his bill is not filed for eleven years after the establishment of this Court. In the meantime, the property he seeks to recover has been greatly improved. One witness says that a thousand dollars would not pay for the improvements. He seeks relief, not against *Shade* only, but against *Schnellinger* and *Butler*. If his case be one of hardship, the hardship, on the other hand, would be no less upon *Schnellinger* and *Butler* if he were to succeed. I think the law is against him, and that *Shade's* deed, though a sheriff's deed, having been first registered, is entitled to priority.

TORRANCE V. WINTERBOTTOM.

Bankrupt—Parties.

To a suit of foreclosure against the assignees of a bankrupt mortgagor, October 17. the bankrupt is not a necessary party.

This was a bill of foreclosure against the defendant, the assignee of the estate of the mortgagor, who had previously become bankrupt, and who was not joined as a defendant in the suit. Statement.

Mr. Galt, for the plaintiff, on a former day had moved for a summary reference to the Master, under the 77th order of May 1850—citing *Coote* on Mortgages, page 503, to shew that it is not necessary to join the bankrupt with the assignee in a suit brought against the latter for the foreclosure of a mortgage security executed by the mortgagor previously to his bankruptcy. Argument.

THE CHANCELLOR.—We have considered the motion for a summary reference made in this cause. Upon looking into the authorities, we are of opinion that the plaintiff has pursued a proper course in not making the bankrupt mortgagor a party; and that according to the cases of *Collins v. Shirley* (a), *Singleton v. Cox* (b), *Cash v. Blecher* (c), and *Kerrick v. Saffery* (d), he is entitled to the reference asked for. Judgment.

WHITE V. CUMMINS.

Practice—Guardian.

The Court will appoint the testamentary guardian a guardian *ad litem* October 2. to infant defendants, without requiring all the infants to be produced in court, when it appears that the interest of the guardian is not opposed to that of the infants.

On a previous day a motion had been made for the appointment of the mother and testamentary Statement.

(a) 1 R. & M. 638. (b) 4 Hare, 326. (c) 1 Hare, 310. (d) 7 Sim. 317.

1851. guardian of the four infant defendants as the guardian *ad litem*, two of the infants only appearing in court when the motion was made.

White
v.
Cummins.

Argument. Mr. Mowat, for the defendants, cited *Drant v. Vause (a)*, *Peascod v. Tully (b)*.

THE CHANCELLOR.—Upon the application to have their mother and testamentary guardian appointed guardian *ad litem*, in this suit, for four infant defendants, Mrs. Cummins, their mother, appeared in court with the two elder children, William Bernard Cummins and John Richard Cummins; the two younger children were stated to have been absent from home, in the county of Welland, at the time of the application.

Judgment. The practice upon these applications would seem, to some extent, unsettled. The cases cited, especially *Drant v. Vause*, which was considered both by Lord Cottenham and by the Vice Chancellor Knight Bruce, and *Peascod v. Tully* before Lord Cranworth, seem to us to warrant an order in the present case.

We think it reasonable that the costs of the plaintiffs' motion to have a solicitor of the court appointed guardian for the infants—rendered unnecessary by this order—should be costs in the cause (c).

The order may be drawn up, upon an affidavit being produced showing that the interest of the mother is not opposed to that of the infants.

(a) 2 Y. & C. C. 524. (b) 15 Jurist, 663. (c) Barnton v. Hooper, 10 Beav. 168.

O'CONNELL V. CHARLES.

1851.

Trustee—Parties—Creditors.

To a suit brought by or against a trustee of an insolvent's estate, in respect of a sum owing by one of the debtors of the insolvent, the creditors for whose benefit the trust-deed was executed are not necessary parties. June 13.

This was a suit by one of the debtors of *John Lister*, for the purpose of redeeming a mortgage executed by the debtor for a debt due to the insolvent. The bill charged frequent applications by the plaintiff to the defendant, as mortgagee, to come to a settlement, in order to ascertain the amount due on foot of the mortgage, but which requests the defendant had refused to comply with.

Mr. *Morphy*, for plaintiff, now moved for a summary reference to the Master, under the 77th order of May 1850; and asked that the decree might direct the defendant to pay the plaintiff the costs of the suit, proceedings have been rendered necessary in consequence of the defendant refusing to come to a statement of accounts—citing *Sparke v. Montriau (a)*, *Cliff v. Wadsworth (b)*, *Price v. Price (c)*.

Mr. *Mowat*, for the defendant, objected that the creditors of *Lister* were not parties.

THE CHANCELLOR.—It appears that one *Lister*, having become involved, assigned all his estate, real and personal, for the benefit of his creditors, to the defendant *Charles*. The plaintiff was, at that time, indebted to *Lister*; and *Charles*, having caused proceedings to be taken against him for the recovery of the debt, obtained the securities which form the subject of the present suit.

The objection to this reference is, that the creditors of *Lister*, who executed the deed of assignment, should have been parties.

a) 1 Y. & C. 103. (b) 2 Y. & C. C. C. 598. (c) 16 L. J. N. S. Ch. 232.

1851.

O'Connell
v.
Charles.

This suit is founded upon a security obtained by the trustee, in pursuance of the trusts, after the execution of the deed of assignment. This is not a suit for the administration of the estate. It is a proceeding between one of the debtors to this trust estate and the trustee, having for its object, or one of its objects, the ascertainment of the amount due from such debtor. Its effect will be, to place in the hands of the trustee a further portion of the estate, to be hereafter distributed by him in accordance with the provisions of the deed.

Did the authorities warrant the proposition, that in suits of this class—which must be extremely numerous in the administration of a single estate—all the *cestuis que trust* must be parties; that practice, in our opinion, would be inconvenient to a degree requiring correction. But the cases establish, we think, that suits like the present may be sustained by the trustee alone, either as plaintiff or defendant, and that there must therefore be a decree as prayed (a).

As to the costs of this suit, we think that nothing is shewn here to deprive the defendant, as mortgagee, of his costs. The order must be in the usual form.

HOOKE V. MCQUEEN.

Specific performance—Laches—Uncertainty in the terms of the contract.

December 10 and 13 1850. Where a contract for the sale of lands is entered into, but the purchaser is not let into possession, what delay, on the part of the purchaser, in taking steps to enforce his contract will disentitle him to a decree for a specific performance, considered.

March 18 & October 3 1851. Where a contract was for the sale of a lot of land, "and as much of lot seventeen as should require to be flooded for the purpose of working a mill on lot sixteen," [the lot contracted for]; *Held*, that, as the quantity of land on lot seventeen was capable of being ascertained by the verdict of a jury, or an enquiry before the Master, there was not such an uncertainty in the terms of the contract as to render it void.

Argument.

Mr. Mowat and Mr. Crickmore for the plaintiff.

Mr. Gwynne, Q. C., and Mr. Galt for the defendants.

(a) *Franco v. Franco*, 3 Ves. 75; *May v. Selby*, 1 Y. & C. C. C. 335; *Mitford's Treatise on Pleading*, 201, 5th ed.

On the point that plaintiff was entitled notwithstanding the delay—*Hunter v. Daniel* (a), *Moxhay v. Inderwick* (b), *Guest v. Homfray* (c). 1851.
Hook
v.
McQueen.

As to notice by defendants of plaintiff's right—*Dryden v. Frost* (a), *Jones v. Smith* (e).

As to uncertainty in terms of contract—*Doe Webb v. Dixon* (f), *Dann v. Spurrier* (g), *Sweet v. Lee* (h), *Idle v. Thornton* (i), *Gregory v. Meighill* (j), *Story* on contracts, sec. 640, were cited amongst other cases by the plaintiff. Argument.

For the defendants—*Mitford's Pleading* 275, 278–9 (4 Ed.), *Brandlyn v. Ord* (k), *Lowther v. Carlton* (l), *McQueen v. Farguhar* (m) *Story's Eq. Jur.*, sec. 742; *Brown v. Street* (n), were, amongst other cases, referred to.

THE CHANCELLOR.—This is a bill for the specific performance of a contract for the purchase of a parcel of land in the township of Middleton. It appears that one *Stilwell*, being equitably entitled, as locattee of the Crown, or rather as assignee of the locattee of the Crown, to lots 16 and 17 in the first range north of the Talbot road, in the township of Middleton, contracted to sell the north half of 16 and a portion of the north half of 17 to one *Thomas*, for the sum of 175*l*. This contract was prepared in the form of a bond from *Stilwell* to *Thomas*; the instrument was, however, signed by both parties on the 10th of September 1845, and provided for the payment of the purchase money in this way—75*l*. on or before the 1st of January 1846, 37*l*. 10*s*. on the 1st of January 1847, 31*l*. 5*s*. on the 1st of January 1848, and the balance (31*l*. 5*s*.) on the 1st of January 1849, with interest on the several instalments as they fell Judgment.
October 3.

(a) 4 Hare 420. (b) 11 Jurist 837. (c) 5 Ves. 821. (d) 3 M. & C. 670. (e) 1 Ph. 244. (f) 9 East. 15. (g) 7 Ves. 231. S. C. 3 Bos. 442. (h) 3 M. & G. 453. (i) 3 Camp. 274. (j) 18 Ves. 328. (k) 1 Atk. 571. (l) 2 Atk. 139. (m) 11 Ves. 478. (n) 1 U. C. Q. B. R. 124.

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1851. due. *Stilwell* bound himself to execute a good and sufficient conveyance on fulfilment of these stipulations; but in case of default in making any payment it was provided that the bond should become void.

Hook
v.
McQueen.

Thomas went into possession under this contract, paid the first instalment of the purchase money, and made considerable improvements. On the 5th of June 1846, *Thomas* sold his interest in the premises to the plaintiff *Hook*, and by a deed of assignment executed on that day, covenanted that *Stilwell's* bond was in full force; and he authorised *Hook* or his attorney, to demand a deed upon payment of the sums remaining due to the obligor.

Notwithstanding this absolute assignment of his interest, *Thomas* remained in possession of the property as before, and on the 5th of November 1846 released all his right under the bond to *Stilwell*, the obligor, in consideration of 75*l*. The original bond from *Stilwell* to *Thomas* was executed in duplicate; both parts, however, would seem to have been delivered to *Thomas*—he so swears—and the memorandum of release was endorsed on one of those copies, which was handed over to *Stilwell* at the time of the contract. The duplicate was not delivered up, being in fact at that period in the possession of *Hook*.

Judgment.

Upon the completion of this transaction, *Stilwell* resumed possession of the property and continued in occupation until the 9th of September, 1847, when he sold the north halves of both lots to the defendants for the sum of 250*l*. In order to carry out this contract, *Stilwell* assigned, or procured to be assigned, to the defendants the original location tickets; and, upon the production of these instruments to the proper officer, letters patent were issued in the name of the defendants, which bear date the 23rd of November 1847. The defendants were let into posses-

sion, upon payment of their purchase money, in 1851. September 1847. They have occupied since that period, and made considerable improvements.

Hook
v.
McQueen.

So far as we can gather from the evidence, no communication was had between the plaintiff and defendants prior to the interview of Mr. Maddock, which occurred on the 19th of July 1849. The bill states that the plaintiff was always ready and willing and offered to perform the stipulations of the bond; but the defendants, in their answer, swear that no offer was ever made, and that they were entirely ignorant of the plaintiff's claim until informed thereof by the solicitor, Mr. Maddock, upon the occasion alluded to. Clearly no part of the purchase money has been either paid or tendered; and this bill was only filed on the 15th of October 1849.

Some points of importance were raised upon the argument, growing out of the form of the contract, and the frame of the record. The question of notice was also a good deal discussed. But we cannot properly, as it seems to me, disposed of any of these points at present, because, upon the preliminary question we have had to consider, I am of opinion—with great hesitation however, having the misfortune to differ from my learned brother—that the delay of which the plaintiff has been guilty, unexplained as it now is, forms a sufficient answer to this bill for specific performance.

In equity, time is not, in general, regarded as being of the essence of the contract. It would seem to have been treated by some early judges, if the reports are to be implicitly relied upon, as wholly immaterial. (a) At one period, unquestionably, an opinion prevailed, that time could not be made of the essence of the contract, even by express stipulation. (b) This doctrine, however, was found to be

(a) See the argument of Sir J. Romilly in *Seton v. Slade*, 7 Ves. 265. (b) *Seton v. Slade*, *ubi. sup.*

1851. productive of great injustice; and, after it had been decided that time might be made by the essence of the contract, successive judges, especially *Sir John Leach*, laboured to correct the laxity which had crept into the practice of the court, and to introduce a rule based on sounder principles. Whatever may have been the former doctrine, the undoubted tendency of modern authorities is, that those who come here for specific performance of contracts concerning lands, are bound to regard time to be material, as in other contracts, and to apply promptly for the assistance of the court.

Judgment.

Now, if such be the state of the law, and such the spirit in which this equity is administered in English courts of justice, there is, I think, in the condition of this country, that which ought to induce us to give to objections grounded on delay, in cases circumstanced like the present, the fullest effect which the practice of the courts will warrant. In a case recently before us, (a) the court had occasion to refer to some of the peculiarities incident to this sort of contract in this province, and to consider the effect which such peculiarities ought to have in determining the right to specific performance under the circumstances of that case. The bill there, as here, was filed by the purchaser, but he had been let into possession. A considerable sum,—considerable compared with the purchase money—had been expended in improvements, and the vendor, having acquiesced in that course of conduct, had attempted to determine the contract, and to turn his vendee out of possession without any fair notice of his intention to rescind. Under such circumstances, we thought that it would be at once unjust, and contrary to well settled principles, to dismiss the plaintiff's bill on the ground of delay, after the lapse of a very considerable period, the vendor not having taken

(a) *O'Keefe vs Taylor*, ante 305.

proper steps to determine the contract, but having, on the contrary, permitted the vendee to continue in possession, expending capital, and acting upon the contract as a subsisting engagement.

1851.
Hook
v.
McQueen.

That was, in our opinion, the true conclusion from the English authorities; but the reasoning of these authorities seemed to us to derive great additional weight from considerations peculiarly applicable to a country as yet but partially peopled, where so considerable an outlay is necessary to render the soil fit for cultivation, and where, from such outlay, as well as from the occupation itself, the increase in value is so considerable and so rapid.

But, in suits for specific performance, the authorities on the subject of delay do not by any means, admit of indiscriminate application. Delay arising out of the state of the title, may be innocuous. Delay waived, either expressly or by conduct, cannot, in reason, constitute a defence. But, where the party who files such a bill has shewn an unwillingness to complete the contract; where he comes after great delay, unexplained, without having himself performed the conditions imposed on him by his contract, and where everything, in the position of the parties, and the value of the property, may have been altered, in such a case, reason and authority require that the strict rule should be applied.

Judgment.

Now it is obvious, I think, that *O'Keefe v. Taylor* has no application here. The circumstances of this case point distinctly, in my opinion, to the opposite conclusion from that to which we there arrived. If the peculiar condition of real estate here, and the peculiar habit of dealing with it, warrant the conclusion there drawn—namely, that a vendee, admitted into possession, and suffered to deal with such possession as if such contract were subsisting, is entitled to special consideration—the same pecu-

1851. *liarities prove no less conclusively that, where those circumstances do not exist—where the vendee has not taken possession—has not acted upon the contract, and only comes for specific performance after great and unexplained delay—under such circumstances, the vendor in his turn is entitled to demand that the objection on the score of delay should be allowed the utmost effect warranted by the practice of the court. If, on the one hand, a vendor who has lain by while the contract has been dealt with as subsisting, cannot be permitted to disappoint the just expectations raised by such acquiescence; it would be at least equally unjust, on the other hand, where these circumstances do not exist, to permit a vendee, by lying by, to speculate upon the property of his vendor.*

Judgment

Specific performance is something beyond the legal right growing out of the contract. It is an equitable consequence, flowing from this principle, that those who enter into contracts are bound, in conscience, to their execution in specie. The plaintiff who asks that sort of relief must not come with a doubtful title. He must not have, himself, refused, or unjustifiably neglected, that conscientious observance of the terms of the contract which he seeks to exact from the defendant. He who has himself, without excuse, neglected all that the contract required, and thereby rendered specific execution on his own part impossible, can have no title, as a general rule, to this specific relief.

This conclusion, deducible, as I think, upon strict grounds of reason, from the very nature of the jurisdiction, appears to be sufficiently well settled upon authority also. In *Milward v. Earl Thanet* (a), Lord *Alvanley* observed "Lord *Kenyon* was the first who set himself against the idea that had prevailed,

(a) 5 Ves. 720, note 52.

that where an agreement had been entered into, either party might come at any time; but that it is now perfectly known that a party cannot call upon a court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt and eager." Nothing can be more forcible or perspicuous than the reasoning of Lord Loughborough on the same point, in *Lloyd v. Collet* (a)—"There is nothing of more importance, he says, than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should be certainly known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is not so essential that in no case in which the day has by any means been suffered to elapse the Court would relieve against it and decree performance. The conduct of the parties, inevitable accident, &c., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time the parties shall be at liberty to rescind it. In most of the cases there have been steps taken. *Is there any case in which, without any previous communication at all between the parties, the time has been suffered to elapse? I want a case to prove that, where nothing has been done by the parties, this Court will hold in a contract of buying and selling—a rule that certainly is not the rule at law—that time is not an essential part of the contract.* Here, no step has been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do?"

1851.

Hook
v.
McQueen.

Judgment.

(a) 4 B. C. C. 466.

1851.

Hook
v.
McQueen.

Judgment.

These decisions were pronounced at a time that the doctrine upon this subject was very unsettled. Subsequent cases may have departed somewhat from principle. But the current of modern authority tends distinctly to establish the proposition to which I before adverted—namely, that those who come here for the specific performance of contracts respecting land are bound to regard time as material. In *Walker v. Jeffreys* (a), it was said by a very eminent judge—“The general rule in equity I take to be, that a party who asks the Court to enforce an agreement in his favour must aver and prove that he has performed, or been ready and willing to perform, the agreement on his part. A breach of an agreement may have been committed, for which a jury would only give a nominal damage. A breach may have been committed which a jury would consider as warranted; and if the party committing those breaches has substantially performed other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a court of equity might fail in doing justice if it refused to decree a specific performance.”

In *Gee v. Pearce* (b), decided in 1848, a large sum had been paid upon the execution of the contract; and the bill had been filed within twelve months after its execution, and within one month after the day fixed by the vendor himself, upon subsequent negotiation, for the execution of the conveyance. But the Vice Chancellor *Knight Bruce* dismissed the bill on the ground of delay. The concluding observations of that learned judge seem to me peculiarly applicable to the present case. He says, “But in a suit for specific performance, especially, a plaintiff must have more than a doubtful case; and although I do not say that the plaintiff here brought

(a) 1 Hare 341. (b) 2 DeGex and Smale 325.

speculatively, without knowing, and without having
probable ground for believing, that he should be
prepared with money to pay in due time for what he
bought, yet it is so much more fit to discourage than
to encourage that kind of gambling with the fortunes
and hopes of others; the consequences of disap-
pointment in the receipt of the purchase money at
the appointed time may, in many cases, be so serious
and ruinous that a purchaser not ready with the
price, according to the contract, ought, I think, to
shew a very special case for the interference of the
Court against the vendor."

1851.

Hook
v.
McQueen.

Now, although, as was remarked by the learned
judge, that may well be considered a strong decision
in an English court of equity, and with reference to
former cases, still I am quite persuaded that the
principle upon which it proceeds is the principle by
which this court should be guided in suits circum-
stanced like the present. Here, land is regarded
rather as an article of merchandise. It is treated
for many purposes as a chattel. Ordinary contracts
of sale respecting it, with us, have little in common
with ordinary contracts of sale in England. They
would be regarded in England as exceptional, and
our analogies should therefore be drawn rather from
exceptional than ordinary cases. Again; these con-
tracts of sale prevail here to an extent unknown in
England, while the subject matter is, for the most
part, of inconsiderable value. To permit vendors to
be harrassed by suits for specific performance, under
the circumstances of this case, where the contract has
not been acted upon—where the vendee has been
guilty of great delay, and has wholly failed to per-
form the conditions of the agreement—would be to
deprive parties of that certainty respecting the con-
tract which Lord *Loughborough* represented as so
essential—would be to subject vast numbers of per-
sons to most unreasonable burthens, unreasonable

Judgment.

1851.
Hook
v.
McQueen.

under the circumstances, upon principles of justice, and in many cases greatly disproportioned to the subject matter of the contract. Lastly; when land can hardly be said to have any market price—where the increase in value is so rapid, that contracts, fair and reasonable if carried out as stipulated, are liable, in consequence of such changes, to assume a totally different aspect after the lapse of even a short period—where such is the condition of real estate, there exists, in almost every case, great temptation to that speculation with the hopes and prospects of others, so strongly, and, as it seems to me, so justly condemned by the Vice Chancellor.

Judgment.

The considerations to which I have been adverting, while they strengthen the reasoning of the Vice Chancellor in *Gee v. Pearce*, have also a strong tendency, as it seems to me, to prove the applicability of Lord *Erskine's* language in *Alley v. Deschamps*, (a) to a very large proportion of contracts for sale of lands in this country. His Lordship observes—“With regard to this particular case, it would be very dangerous to permit parties to lie by, with a view to see whether the contract will form a gaining or losing bargain, and according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance, which is always the subject of discretion.” I quite concur in the justice of that observation. I believe that at this day specific performance would be refused in England in any case similarly circumstanced; and it seems to me to be peculiarly proper that the principle there laid down should be kept constantly in view in this court, where so large a proportion of contracts for the sale of lands are affected by similar considerations.

It is not necessary, however, to refer to any extreme

(a) 13 Ves. 225.

case for the purpose of justifying the conclusion at which I have arrived in the present instance. Numerous authorities appear to me to prove that the delay which has arisen here is a sufficient answer to the plaintiff's demand.

1851.

Hook
v.
McQueen.

In *Southcomb v. Bishop of Exeter*, (a) Sir James Wigram said—"if the plaintiffs had simply acquiesced in the note of the 20th of August 1841, and had delayed filing their bill to the 30th of August, 1843, the court ought to have admitted such conduct as an answer to the plaintiff's case in this suit." In that case, therefore, although a large deposit had been paid, the Vice Chancellor decided that a delay of two years would have been an answer; and other still more stringent decisions might be cited. (b) But in the present case the delay has been much more considerable.

Judgment

I purposely refrain from deciding this case upon the clause in the contract which expressly provides that it shall become void upon default in making any payment; because the case, in my opinion, admits of being rested, and I desire to rest it, upon the broader ground. (c)

Apart from that consideration, then, we find that the plaintiff purchased in 1846. Since that period, so far as I can judge, the contract has been a dead letter. He never acted on it in any way, and up to this moment has not fulfilled one of its conditions. It is not shewn upon the evidence—indeed the reverse is to be clearly inferred, I think—that any communication, with a single exception to which I shall presently refer, took place between the plaintiff and those interested in this contract, until the month of July 1849. This bill was filed in October 1849. During

(a) *Hare* 213. (b) *Heaphy v. Hill*, 2 S. & S. 29; *Watson v. Reed*, 1 R. & M. 236. (c) *Benedict v. Lynch*, 1 Johnson, C. Rep. 270; *Scot v. Field*, 7 Ohio, 90.

1851.

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v.
McQueen.

all that period the vendor, or his assignee—for I do not consider the question of notice—is suffered to remain in possession—capital is expended—the property becomes enhanced in value—everything is changed. Now, it appears to me that there this is no principle of reason, and no binding authority, which would justify us in decreeing the specific execution of this contract under such circumstances.

Judgment.

The evidence points to some communication between the plaintiff and *Stilwell* in November 1846, although the account given of that matter is very indistinct. *Stilwell* has deposed to such an interview, if his testimony is to be credited. For the purpose of this question, it ought, I think, to be treated as worthy of credit. Either it is unworthy of trust—and then the plaintiff has failed to fix the defendants with notice; or it is worthy of credit, in which case we should not be warranted in disregarding this particular portion of it. *Stilwell*, then swears, that he had an interview with one *McLeod* on the behalf of *Hook*, as I gather, in November 1846. He says that he then informed *McLeod* of the transaction between himself and *Thomas*, but at the same time offered to fulfill his agreement if *Hook* would pay the purchase money. This offer was declined by *McLeod*. This occurrence, if true, does not seem to me to improve the plaintiff's position. He had in November 1846 distinct notice of the sale to *Stilwell*. He was called upon to carry out the terms of the bond, but he remains passive till October 1849, a period of nearly three years.

It was incumbent upon the plaintiff to have made out his title; that is, in my opinion, he should have shewn not a contract merely, but a contract on all the circumstances proper to be specifically enforced.
(a) This he has failed to do.

(a) Sir S. Romilly, Arg. *Guest v. Hompay*, 5 Ves. 821; *Levy v. Lindo*, 3 Mer. 83; *Walker v. Jeffry*, 1 Hare 352; *Geer v. Pearse*, 2 De G. & S. 341.

Upon the evidence before us, did I feel myself at liberty to act upon it at once, the proper decree would be to dismiss the bill with costs; but as this defence was not distinctly relied upon by the answer, and as the plaintiff may have been taken by surprise, he may be entitled, if he desire it, to the same reference which was directed in *Heaphy v. Hill*—namely, to a reference to the Master to enquire whether anything and what had passed between the parties, or any person on their behalf, relating to the subject of the agreement after the 5th of June 1846.

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ESTEN, V. C.—In this case it appears that one *David Stilwell*, the assignee of the locatees of the Crown of lots number sixteen and seventeen, sold lot sixteen "and as much of lot 17 as should require to be flooded for the purpose of making a mill on lot sixteen" to one *George Thomas*, for 75*l.*, and upon that occasion executed a bond dated the 16th day of September 1845, whereby he bound himself to convey the lands so sold to *Thomas* in fee simple, free from incumbrances, upon payment of the purchase money in the following manner—that is to say, 75*l.* with interest on the first day of January 1846, and the remainder with interest by three annual instalments of unequal amount on or before the 1st of January in the years 1847, 1848 and 1849.

Judgment.

Thomas entered into possession and made improvements and paid the first instalment of 75*l.* on the 17th of September 1845. In June 1846 *Thomas* assigned all his interest to the plaintiff and delivered to him the bond which he had received from *Stilwell*, a counterpart of which, however, remained in the possession of *Stilwell*, who also had retained the title deeds of the property. In November 1846 *Stilwell* repaid to *Thomas* the 75*l.* he had previously received from him in respect of the property and obtained from *Thomas* the possession, which *Thomas*

1851. had until that time retained; and in September and October 1847 *Stilwell* sold the north halves of the two lots to the defendants *Fletcher* and *McQueen* for 250l. which they paid to him, upon which occasion *Stilwell* appears to have procured and delivered to the defendants an assignment to them from one *Reagh* of lot No. 16, of which he was the locatee of the Crown, and to have himself executed to the defendants an assignment of lot No. 17, and to have delivered to the defendants the location tickets of the two lots granted respectively to *Reagh* and one *House* the locatee of lot 17; whereupon and by virtue of these instruments the defendants procured letters patent of the two lots from the government, and afterwards disposed of the south halves of the two lots for and in the manner directed by *Stilwell*. The present bill is by *Hook* against *Fletcher* and *McQueen*, for the purpose of obtaining a conveyance of the property purchased by *Thomas* from *Stilwell*, upon the payment of the remainder of the purchase money and interest. *Stilwell* is not a party. It is obvious from the foregoing statement that the defendants required the property in question in this cause subject to the equitable claim of the plaintiff—unless, first, the contract upon which this claim is founded is too uncertain to be executed or enforced; or, second, unless the defendants were purchasers for valuable consideration without notice of the plaintiff's equity; or, third, unless the plaintiff has forfeited, by his laches, the title to equitable relief which he would otherwise have had. The only question raised upon the pleadings was that of notice; but the alleged laches of the plaintiff was insisted upon in the argument, and the Court itself suggested the question as to the uncertainty of the contract, and had the case shortly re-argued upon that point. To dispose of this point, first I may say that I do not think the contract void for uncertainty. *Certum est quod certum reddi potest*, and I have no reason to think that

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either a jury or the Master would be incompetent to determine the quantity of land in lot No. 17 which it would be necessary to flood for the purpose of working any saw mill that could be reasonably erected on lot No. 16. Then, with regard to notice, I think that notice is proved against the defendants. The evidence of *Stilwell* is clear to the point, and his evidence has not been impugned, nor does any reason appear why it should be questioned or doubted. His interest is, I think, towards the defendants. Then his evidence is strongly corroborated by that of Mr. *Maddock*. It is true that notice is denied by the answer; but some parts of the answer are, I think, manifestly not true; and whether this proceeds from wilful misrepresentation or from the defendants not understanding the full effect of the expressions employed in the answer, it greatly detracts from the weight which would otherwise be attributable to it. Lastly, with regard to the laches of which the plaintiff is supposed to have been guilty in the assertion of his rights. I have already observed that this point was not raised by the answer; and it was contended by the plaintiff that the defendant, by not raising the objection in the answer, had waived it. This observation may be strictly just; but the Court, I apprehend, will not give effect to a claim which has not been prosecuted with due diligence, merely because the defendant has not objected on that ground, however disposed it may be to afford the plaintiff an opportunity, by proper explanation, of removing a difficulty to which his attention has not been called by the answer. Many cases were cited upon this subject, almost all of course derived from the English reports. These cases are very valuable as affording general rules, but one can seldom expect to find much similarity in their circumstances between cases here and cases in England. No two things can well be more different than the mode of conducting sales of land there and the mode of conducting

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1851. them here. The English cases establish that where the defendant, in a suit for specific performance of an agreement for the sale of land, has been guilty of no fraudulent or improper conduct, has been himself ready at all times to complete his agreement, has called upon the other party to do the same, and when he failed to do so has given him notice that he considered the contract at an end, any considerable delay afterwards on the part of the plaintiff, whether of two years and eight months, as in *Stewart v. Smith* (a), or of two years, as in *Southcomb v. Bishop of Exeter*, reported in the same book, may debar him from relief. It may also be right to refuse relief to a purchaser who, when the time for completing the contract had arrived, not having the money ready, resorted to a system of making groundless objections for the purpose of gaining time, and altogether exhibited a backwardness in performing the agreement on his part, while he remained still desirous of reaping the benefit of it. This was the case of *Gee v. Pearce*, reported in 2 *DeGex* and *Snale*. These and many other cases which may be mentioned, are no doubt extremely able and correct decisions, and very valuable to us as affording general rules, which we are called upon to apply, for the most part, to a very different train of circumstances. Let us see in what situation the plaintiff *Hook* was placed, in this case, when *Thomas*, in breach of his duty, received from *Stilwell* the 75*l.* which he had previously paid to him, and surrendered the possession of the property to *Stilwell*, and when *Stilwell* resold and conveyed the property to the defendants, and they acquired the legal estate in the lands by means of the crown patent. No laches can, I suppose, be imputed to the plaintiff, in a case where both *Stilwell* and the defendants had full notice of his claim, for not proceeding in this Court before the month of January in the year 1849, when the

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(a) 6 Hare, 222.

bond became due, although the money might have been paid before and the deed demanded. With regard to the payment of the instalments, one of these became due in January, 1847, before the sale to the defendants; but *Stilwell*, by receiving the 75*l.* from *Thomas*, had declared his determination, so far as he had the power, to put an end to this agreement, and moreover had deprived the plaintiff of the possession to which he was entitled; and when the sale to the defendants had taken place, not only did the same reasons operate, but it also became a matter of extreme difficulty to determine to whom the instalments ought to be paid. The question then resolves itself into the delay to file the bill, from January to October, 1849; but this I think altogether insufficient to debar the plaintiff from relief in a case where he had been wrongfully deprived, by the defendants and those under whom they claim, after they had fraudulently acquired the property, of the possession of it, to which he was entitled for more than two years, where the defendants have made no improvements, and where the delay has operated in their favor, by affording them an opportunity of stripping the property of the timber, for which alone it seems to be valuable.

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There is, however, one difficulty in the case. As *Stilwell* is not a party, I do not know to whom the plaintiff is to pay the money which remains due. He offers indeed to pay it to the defendants, but it seems to me that they cannot be compelled to receive it in prejudice of their remedy against *Stilwell*. If they have no such remedy, they probably will be very glad to receive it, and thereby obviate the difficulty. Subject to this objection, I think there should be a decree for the plaintiff with costs.

NOTE.—The chancellor stated, that, if desired by the parties, his honor V. C. *Esten* would concur *pro forma* in the opinion pronounced by the Chancellor, in order that there might be a judgment of the Court

1851. from which to appeal, or the cause might be re-heard, when his honor V. C. *Spragg* would have an opportunity of giving his opinion on the case—the former argument having taken place before his appointment. Since the expression of this view of the Court, the Reporter has been informed that the parties have arranged the matter out of Court, and therefore has reported the case in its present form, although it was intended to withhold it until after the re-hearing or the case had been carried to the Court of Appeal, in order that a decision on the point might have been given. However, the important bearing the views expressed by the Court will have on numerous transactions arising throughout the country, renders the case of very great value to the profession generally.

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STINSON V. STINSON.

Practice—Parties—Executor.

Oct. 3 & 17. Where an Executor, who had renounced probate of the will, is made defendant to a suit, the bill can only be dismissed as against him with costs.

Statement. The bill in this case was filed for an account of partnership dealings as between the plaintiff and *John Stinson* deceased; alleged the death of *John Stinson* after having duly made his will, whereby he appointed all the defendants his executors. The defendant *Bradley* denied having proved the will or intermeddled with the estate in any way; and on a former day Mr. *McDonald*, for the plaintiff, moved for a summary decree for an account under the 77th order of May, 1850; and for leave to dismiss as against *Bradley* without costs. The latter part of the motion was opposed by counsel for the defendant, and the court directed them to look into the authorities; and on this day—

Argument. Mr. *McDonald*, for the plaintiff, cited *Strickland v. Strickland*, (a); *Venables v. The East India Co.*, (b); *Smithy v. Hinton*, (c).

Mr. *Mowat* for defendants, cited *Penny v. Beavan*, (d); *Higgins v. Frankis*, (e); *Silcock v. Roynon*, (f); *Dyson v. Morris*, (g); *Brown v. Pitman*, (h).

(a) 12 Sim. 463. (b) 2 Exch. R. 633. (c) 1 Vern. 31. (d) 7 Hare, 135. (e) 15 Jurist, 277. (f) 2 Y. C. C. 376. (g) 1 Hare. (h) Gilb. 75.

THE CHANCELLOR.—The bill in this case states the death of *John Stinson*—the appointment of *Richard Martin, John Martin, Hugh Moore* and *John Bradley* to be his executors, and alleges that they subsequently duly proved his will. 1851.
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Bradley's answer states that he had neither proved the will nor intermeddled with the estate, but on the contrary had renounced probate.

The plaintiff now asks to dismiss his bill against *Bradley* without costs, he having been a proper if not a necessary party.

It is clear that *Bradley* is not a necessary party. (a) It would be competent for him, I presume, to come at any time during the life of his co-executors, notwithstanding his renunciation; and therefore that act would not absolutely preclude him from taking part in the administration of the estate. (b) Still we think that the plaintiff was not authorized in making him a party for the mere purpose of obviating that possible difficulty, and that both upon principle and authority, the bill must be dismissed with costs. Mr. *Calvert* in his work on parties (p. 140) says, "An executor who has done no act in this capacity need not be made a party as plaintiff. A bill against him as defendant will be dismissed with costs."

FULLER V. RICHMOND,

Practice—55th Order—Examination of parties—Witnesses.

The statute 14 & 15 Victoria, ch. 66, does not authorize parties being Oct. 7 & 17. received as witnesses on their own behalf.

The 55th order of May 1850, renders it no longer necessary to obtain a special order for the examination of witnesses in a cause before an examiner.

Mr. *Vankoughnet*, Q. C., moved for an order to permit one of the defendants, in this cause to examine Argument.

(a) *Strickland v. Strickland*, 12 Sim. 463; *Dyson v. Morris*, 1 Hare, 413. (b) *Venables v. East India Co.*, 2 Ex. 633.

1851. his witnesses before an examiner in the country, and
 Fuller also for leave to examine his co-defendants as wit-
 V. nesses. It may be questioned whether it is now
 Richmond, necessary to obtain an order for the examination of a
 co-defendant, as it has been ruled at Nisi Prius by
 some of the judges that a party to a suit is, under the
 statute of last session, receivable as a witness on his
 own behalf.

October 17. THE CHANCELLOR.—This was a motion that the
 defendant *Richmond* might be at liberty to take his
 evidence before an examiner at Belleville, and for
 the usual order to examine two co-defendants as
 witnesses.

Judgment. There is no necessity for a special order to enable
 the defendant to take his evidence before an examiner
 at Belleville; the object of the 55th of the orders of
 May 1850 was to obviate the necessity for such appli-
 cations.

The latter part of the motion raises the question
 whether under the statute 14 & 15 Victoria, ch. 66,
 parties to a suit can be received as witnesses in their
 own behalf.

We are of opinion that the statute in question has
 not that effect. It was argued that the 12th Victoria,
 ch. 70, would have the effect of rendering such evi-
 dence admissible but for the proviso to the first
 section; and that the proviso having been repealed
 by the late act, all parties must be now admissible
 as witnesses.

Independent of the proviso, it does not appear to
 us that the 12th Victoria, ch. 70, could have had the
 effect attributed to it. It is obvious, we think, that
 the Legislature had no such intention. The first
 clause enacts, "That no person offered as a witness
 shall henceforth be excluded by reason of incapacity
 from crime or interest from giving evidence either

in person or by deposition;" and again—" but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or enquiry, or of the suit, action or proceeding in which he *is offered as a witness*, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

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Now it appears to us clearly, that the object of this clause was to obviate objections, on the score of interest or infamy, to persons who, but for such objections, would have been good witnesses. But the parties in suits were excluded from being witnesses, on grounds altogether independent of their interest; otherwise the plaintiff might always have been called by the defendant, and *vice versa*, because the interest, then, would have been adverse. The rule which excluded parties was not, in our opinion, abrogated by the statute 12 Vic. ch. 70. The proviso seems to have been introduced *ex abundanti cautela* to preclude the possibility of such an inference being drawn from the language.

Judgment.

Again: The recent statute does not appear to us to contemplate the admission of parties as witnesses in their own behalf. The preamble, after reciting the proviso to the 1st section of the 12th Vic. ch. 70, proceeds—" and whereas, it is desirable that in no case should there be any exclusion of any person from giving evidence, but that all persons should be admitted to give evidence on oath or affirmation, as the case may be, *as hereinafter provided*." Now the act contains no provisions for the examination of parties on their own behalf. The first section merely repeals the proviso to the 12th Vic.

1851. ch. 70. Then the second section enacts "that any party to any civil proceeding may be examined as a witness in any suit or action *at the instance of the opposing party* in such suit or action," and the clause then goes on to prescribe the mode of taking the evidence. The preamble, then, pointing, not to an indiscriminate examination of parties, but to an examination *according to provisions thereafter made*, and no provision having been made except for an examination at the instance of the opposite party we are of opinion that the Legislature did not intend to authorize the admission of parties on their own behalf.

Judgment. Again: Had the Legislature intended to legalize the admission of all parties indiscriminately, as witnesses, by the first section, and were that the true effect of the clause, there would have been no occasion for the special provision in the second section which legalizes the examination of parties to a limited extent; and does not that limited provision, upon well settled principles, exclude the construction contended for?

Upon these grounds, we are of opinion that the statute in question does not authorize the examination of parties on their own behalf.

PAPINEAU V. GURD.

Statute of Frauds—Parol evidence.

February 25. Where a sheriff's sale of certain lands was about to take place and the plaintiff, who was the owner, agreed with the defendant that the latter should buy the property at the sale for the former, pay for it out of his (the defendant's) own funds, and give the plaintiff two years to pay him; and it appeared that the property was then sold for about one-fifth or one-eighth of its value to the defendant, who paid for it, and the plaintiff was allowed to remain in possession for two years under the agreement, and to make valuable improvements on the property: *Held*, that in such a case parol evidence was admissible to prove the agreement.

Statement. The principal question in this case related to the admissibility, under the circumstances of the case,

which are set forth in the judgment, of parol evidence to prove the agreement set up by the plaintiff, and on the strength of which he claimed the right of redeeming the property. The defendant by his answer claimed the benefit of the Statute of Frauds.

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Mr. Mowat for the plaintiff—Whether the defendant is looked upon as agent of the plaintiff, or the Court regard the bill as one for the specific performance of a contract entered into by parol, or as a suit for the redemption of a mortgage, still the plaintiff is entitled to the relief he asks. I submit, that the law is well settled that if one employ another to act as agent in the purchase of an estate, the Court will declare such agent a trustee of the property for his principal, even though no money was furnished by the principal for that purpose, and the purchase was paid for out of the funds of the agent (a).

Argument.

The evidence in the case shews distinctly that the property purchased by the defendant, and as the bill alleges, for the plaintiff, was worth from 350*l.* to 500*l.*; this the defendant was enabled to purchase for 62*l.*, in consequence of the arrangement entered into by him with the defendant, and it would be difficult to conceive a case of greater hardship or grosser fraud than this would be, if the Court should refuse the equitable relief sought by the plaintiff.

It is shewn that, after the sheriff's sale, the plaintiff was allowed to remain in undisturbed possession, making valuable improvements on the property, valued by the witnesses at 200*l.* If viewed as a mortgage transaction, then *LeTarge v. D'Tuyl* (b) and *Barnhart v. Patterson* (c), are authorities directly in support of the case made by the bill and established by the evidence. He also referred to *Dowell v. Dew* (d), *Dale v. Hamilton* (e), *Sutherland v. Briggs* (f).

(a) *Lees v. Nuttall*, 1 Russ. and M. 53; S. C., 2 M. & K. 284, 819; *Taylor v. Salmon*, 4 M. & C. 134; *Austen v. Chambers*, 6 Clk. & F. 1. (b) *Ante* vol. I, p. 227. (c) *Ib.* 459. (d) 1 Y. R. C. C. 345. (e) 5 Hare, 369. (f) 1 Hare, 20.

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Mr. *Turner* for the defendant—If the plaintiff's case shew that the defendant has been guilty of any fraud, no doubt the plaintiff would be entitled to relief. Treating this as a bill for the specific performance of a parol contract, it is clear that plaintiff is not entitled; for although the plaintiff is shewn to have been in possession of the property, still it is not pretended that he took possession under the verbal contract, so as to constitute his possession a part performance, but his possession was a mere continuance of his occupation while he was the owner.

Argument.

The plaintiff, it would appear, was content to rely upon the honor of the defendant: therefore the statute is a complete bar to his recovery, and which the defendant has claimed the benefit of by his answer. It is admitted, that if *Gurd* went to the sheriff's sale acting as agent, the Court would declare him a trustee of the estate purchased; the evidence, however, fails to establish the fact of agency.

October 28.

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THE CHANCELLOR.—*John Papineau* being seized in fee simple of the premises in question in this cause, died, intestate as to his real estate, which descended upon his eldest son and heir at law, the present plaintiff, but having made a will by which he constituted his wife, *Verenique Papineau*, his executrix. *Maria Donelley* recovered judgment against *Verenique Papineau*, as such executrix, for a debt due by the testator, amounting with costs to about 62*l.* 10*s.*; and on the 11th of June 1841 the premises in question were sold by the sheriff of the Western District, by virtue of a writ issued upon that judgment, to the defendant *Gurd*. The question is, whether he has an absolute title to the estate so acquired, or is subject to redemption.

The plaintiff's statement is, that, prior to the sheriff's sale, he applied to the defendant to advance the sum necessary to pay off the judgment; proposing

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an arrangement of this sort—namely, that the defendant should become the purchaser at sheriff's sale, with liberty, however, to the plaintiff to redeem within two years, upon payment of the sum advanced. He alleges that this proposal was accepted by the defendant, who subsequently became the purchaser at sheriff's sale, in pursuance of it, for the sum due upon the judgment. He says that he himself abstained from further efforts to pay off the debt, and acquiesced in the sale in consequence of that agreement; and that in accordance with and under it, he was permitted to remain in possession for a period of two years, during which time he made large improvements, valued at 200*l.*, and paid to the defendant various sums for interest. The property, at the time of the sale, is shewn to have been worth from 300*l.* to 500*l.*

The answer is somewhat inconsistent. The defendant unquestionably admits the plaintiff's case to a considerable extent, but he represents the agreement set up in the bill as a mere voluntary offer on his part, made from motives of compassion, of no binding effect in law; and he pleads the Statute of Frauds.

Judgment.

The admissions in the answer relieve the case of much difficulty which might otherwise have arisen. The defendant seems to us, indeed, to admit, in substance, the plaintiff's case. In giving an account of their first interview he says, "some time about a month previous to the sale of the said lands and hereditaments and their appurtenances by the said sheriff in the said bill mentioned, the defendant casually met the said plaintiff near his own house, and in conversation with him asked the said plaintiff if he were aware that the said lands and hereditaments in the said bill mentioned had been advertised for sale by the sheriff, whereupon the said plaintiff replied that 'he was aware thereof,' and in express

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terms he the said plaintiff solicited defendant (and defendant denies that he defendant did offer to purchase or to lend to the said plaintiff the money wherewith to purchase the same) to purchase the said lands and hereditaments at the said sale, and to let him the said plaintiff have the said lands and hereditaments again if the said plaintiff should repay the purchase money and interest thereof to defendant within two years from the time of the said sale; and thereupon defendant, in reply to the said solicitation of the said plaintiff, answered that he would take three days to give him an answer, because he defendant did not know whether it was likely that the said lands and hereditaments would or would not be sold high. And this defendant saith, that he defendant and the said plaintiff afterwards met together, in the presence of *T. W. Keating*, a mutual neighbour of plaintiff and defendant, and then defendant informed said plaintiff that he defendant would purchase the said lands at the said then intended sale and at such meeting defendant informed the said plaintiff that if the said lands and hereditaments should be sold at a low price, at the said intended sale, he defendant would become the purchaser thereof, and would, at the expiration of two years, let him the said plaintiff have the same upon payment to him defendant, by the said plaintiff, of the purchase money which defendant should pay for the same, and of all expenses which defendant might be put to in respect of the said lands and hereditaments or the purchase thereof." A little further on he says, "but defendant saith he admits it to be true that he defendant, out of compassion to the said plaintiff and in kindness to him, verbally and not otherwise, promised to the said plaintiff that in case he defendant should become the purchaser of the said premises he defendant would allow the said plaintiff to remain in possession thereof for the space of two years, within which time he would allow the said plaintiff

the chance or opportunity, if he should avail himself thereof, of repaying to defendant the purchase money he should give for the said premises, with interest for the same, and of paying and satisfying defendant for his loss of time and expenses in and about the said premises." In speaking of the sale, he says "Defendant admits that at the time of the said sale he did intend to fulfil the promise so made by him verbally to the said plaintiff as aforesaid." And in relation to the payments by the plaintiff, as he alleges on account of interest, he says, "and defendant admits it to be true that the said plaintiff did, in the course of two years next ensuing the date of the execution of the said deed poll, or instrument of conveyance, pay to defendant some sum or sums of money, partly in cash and partly in goods, but the exact amount thereof defendant saith that he doth not recollect and cannot state as to his belief or otherwise; but this defendant denies that the same, or any part thereof, or any other money, was paid by the said plaintiff to defendant towards the satisfaction or discharge of the said sum of 62*l.* 10*s.*, so in the said bill untruly alleged to have been lent and advanced by defendant to the said plaintiff, and so by the said bill untruly alleged to be secured by such pretended mortgage security as aforesaid, or the interest thereof; but defendant saith that the said money so paid to defendant by the said plaintiff as herein aforesaid, was paid as by way of rent or satisfaction for the use and occupation of the said premises by the said plaintiff for the said period of two years from the execution of the deed poll, &c."

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Now—apart from the qualification with which the defendant has guarded his admissions, to which I shall presently advert—it is not to be doubted, I think, that these passages go very far to establish the plaintiff's case. They agree, in substance, as it seems to me, with the statements in the bill, and are in exact

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accordance with the evidence, except in the particulars to which I have adverted. They prove, beyond doubt, that the defendant purchased this property for about a fifth or sixth part of its value, not adversely to the plaintiff but at his instance, and in accordance with an agreement by which he was to be allowed to redeem. They shew that the plaintiff retained possession for a period of two years, in pursuance of that agreement, and contrary to the letter of the sheriff's deed; and they admit payments which, even upon the answer, must be regarded, I think, as payments of interest.

Judgment.

It is true that the defendant describes the agreement which is the foundation of this suit as a voluntary verbal promise, made out of compassion to the plaintiff and in kindness to him. Certainly the verbal kindness and compassion in which the plaintiff then indulged would be more than ordinarily fallacious, were it to result in transferring the plaintiff's estate to his supposed benefactor, irrevocably at a sixth part of its value. I question very much, however, whether, even upon the statement of the transaction in the answer, the plaintiff can have understood the matter as it is now represented by the defendant. He does not accede to the plaintiff's request at once, but requires three days to consider, and upon compliance stipulates in form for terms sufficiently advantageous to himself. But, whatever may have been the defendant's views, I am at a loss to apprehend the force of the argument drawn from the voluntary character attributed to the agreement in the answer. Had the promise been after the sale—at a time when the defendant, being the absolute owner of the estate, might have exercised an option at his mere pleasure—there would have been some force in the observation. But it preceded the sale. Upon the faith of it the defendant was permitted to acquire the estate. The transaction appears to me

to partake very much of the character of ordinary transactions of the kind. The defendant agreed to advance money—voluntarily, or out of compassion, if you will—upon security; and upon that understanding the purchase was completed.

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That this was, and was understood to be, the true nature of the dealing between these parties, cannot be doubted, I think, upon the evidence. Mr. Keating says, "Some time before the sheriff's sale the plaintiff came to me and asked me if I could help him by lending money to pay the debt. I said I could not. I told the plaintiff that I thought Mr. Gurd, the defendant, could purchase the property *and give him time to redeem it*. Gurd had expressed his desire to help the plaintiff, because he thought it a hard case that the plaintiff should lose his lands. I sent for Gurd, or he came to my house on the same evening, as I think. I said to Gurd, you have, or can have, or get money; do not let him lose his property. Plaintiff, who could not speak good English, through me, asked him the defendant to do it, saying, Mrs. Donnelly has turned me out of doors, and I have no place for myself and my mother. Plaintiff said, will you buy it, Mr. Gurd, and give me one year to redeem it, and if I can't redeem it in one year it must go? Gurd said he would do it, but he must allow him his wages for going to Toronto (as an armourer), and what he would lose in selling a property at Toronto, and pay defendant interest on money advanced, in shape of rent, at six per cent., in flour, boards, &c.; and this the defendant agreed to do. When the year was nearly up plaintiff came to my house and said he could not pay Mr. Gurd. I immediately saw Mr. Gurd and begged him Gurd to give plaintiff another year to pay what was due, saying plaintiff was a poor and industrious man, and if he the defendant got the interest it was enough. I begged him to let him have another year, and the defendant agreed to give

Judgment.

1851. it." This evidence is indirectly, but strongly, corroborated by the testimony of two professional gentlemen, Messrs. *Baby* and *Chewitt*. The latter, at whose office the parties met prior to the sale and in relation to it, says, "*I understood that Gurd advanced the money and took the sale and sheriff's deed to secure himself, and that plaintiff had the right of redeeming it.*"

Papineau
v.
Gurd.

Upon the answer and evidence together, we are of opinion that the sentence which I have just extracted from the evidence of Mr. *Chewitt* expresses truly the real transaction between the parties.

Then, assuming the agreement to be proved, is the parol evidence excluded either by the common law rule, or by the Statute of Frauds? We are of opinion that it is not.

Judgment.

It is unnecessary to consider now what would have been the result had these parties acted upon the agreement only to the extent of permitting the plaintiff to purchase, upon the faith of it, at sheriff's sale; because, irrespective of that consideration, the principles upon which we proceeded in *LeTarge v. DeTuyll*, and *Barnhart v. Patterson*, and which were recognized by the Court of Appeal in the latter case, are sufficient for the determination of the question now before us. The evidence establishes facts inconsistent with the deed. Possession has been retained for two years. Extensive improvements have been made. Interest has been paid. The plaintiff has acted upon the parol agreement in such a way that it would be a fraud upon him unless it were performed. He has been placed in a situation which makes it against conscience that the defendant should be allowed to insist on the want of writing as a bar to his relief; and therefore the parol evidence is, of necessity as it were, admitted. And being received, establishes, in our opinion, the plaintiff's case.

1851.

BAXTER V. TURNBULL.

Partes—Pleading—Partnership.

Three partners having taken a conveyance of real estate, "as, and for August 29. partnership property, for the purposes of the partnership," and one October 28. of the partners having left the Province and another died, a mortgagee of the property filed a bill for the foreclosure of his mortgage.

Held, that the personal representative of the deceased partner was a necessary party, and that the plaintiff must prove the absence from the jurisdiction of the non-resident partner, and perhaps the plaintiff's inability to serve him with process.

Quere.—The effect of a sheriff's sale to a subsequent incumbrancer, of an equity of redemption in real estate of a partnership, where the execution was issued against all the partners, but one of the defendants had died after judgment and before execution, the judgment not having been revived, and such sale having taken place, pending a suit by the first mortgagee for the foreclosure of the mortgage.

Mr. Read, for the plaintiff.

Argument.

Mr. Mowat, for the defendants who had appeared in the suit.

THE CHANCELLOR.—The defendants *McCaul* and October 28. *Young*, together with *Walter Turnbull*, the ancestor of the defendant *Peter Turnbull*, being engaged together in partnership as timber merchants, purchased the premises in question in the cause, and on the 29th of July, 1848, took a conveyance to the then partners, "as and for partnership property, for the purposes of the partnership." They on the same day conveyed it to the plaintiff to secure a partnership debt of 133*l.* subject to redemption on payment of that sum and interest within a year. *Walter Turnbull* died in the month of September, 1849, intestate, leaving *Michael Turnbull* his heir-at-law. In the following month *Michael* died, also intestate, leaving the present defendant *Peter Turnbull*, his heir-at-law, against whom and the reviving co-partners the present suit has been brought by the mortgagee for a foreclosure.

Judgment.

The plaintiff obtained an order that the bill should be taken *pro confesso* against the defendants *Turnbull* and *Young*, and they did not appear upon the

1851. hearing. *McCaul* was not served with process. The bill alleges him to be out of the jurisdiction, and prays process against him upon his return.

Baxter
v.
Turnbull.

The defendants *Crombie* and *Andrews*, who had obtained and duly registered a judgment against the partners in July, 1848, for 1003*l.*, and who, as such judgment creditors, were made parties defendant, have answered the bill. They set up that the defendant *Crombie* is entitled to the equity of redemption, under a sale and conveyance by the proper sheriff, in December, 1849, by virtue of a writ of *fi. fa.* against the lands of the then partners, upon the judgment, in favor of *Andrews* and *Crombie*.

Judgment. No evidence has been taken. The cause was heard upon admissions; and the learned counsel for the judgment creditors objected that the personal representative of *Walter Turnbull* should have been a party, and contended that a decree could not be pronounced without proof of *McCaul's* absence from the jurisdiction.

Looking to the inconsiderable value of the property in litigation, and the difficulty already experienced in bringing the cause to a hearing, we were desirous of affording to the plaintiff every facility which a due attention to the interest of others would admit, and we have very reluctantly come to the conclusion that no decree can be pronounced upon the evidence and pleadings as they at present stand.

The general rule is not denied. *McCaul* is a necessary party. The plaintiff, however, contends that he is excused from bringing the case to the hearing against *McCaul*, in consequence of his being out of the jurisdiction, and he argues that a decree may be now pronounced without evidence of that fact, but

directing an enquiry by the master respecting it, upon the authority of *Mores v. Mores* (a). 1851.

Baxter
v.
Turnbull.

The ordinary and strictly regular course would be to allow the case to stand over, with liberty to the plaintiff to exhibit an interrogatory to prove the defendant's absence (b). *Mores v. Mores* shews that a reference to the master would also be a regular course under such circumstances. But it is no authority for the proposition that a decree, in the absence of a necessary party, without proof of such absence, would be regular. In that case there were several points in which the absent party had no interest. Upon those points *Sir James Wigram* felt himself at liberty to pronounce a decree, under the peculiar circumstances which then existed, directing at the same time an enquiry as to the alleged absence. But no decree was there pronounced as to the question in which the absent party had an interest. Here we are asked to pronounce a decree, not justified by the evidence before us, but to be justified by an enquiry thereby directed. Judgment.

The regularity of the plaintiff's proceedings in relation to *McCaul's* absence was not questioned in any other respect, neither did the learned counsel for the defendant deny that proof of absence merely would entitle the plaintiff to proceed. It will be proper however that the plaintiff should consider whether such evidence would be sufficient under the recent practice, and with reference to a case circumstanced like the present. We had occasion to advert to this subject in *LeTarge v. D'Tuyl* (c), and the practice pursued in *Mores v. Mores* tends to establish the correctness of the observations which were there made.

We are also of opinion, that, as the record now

(a) 6 Hare, 125. (b) *Eggington v. Burton*, 1 Hare, 485, n.; *Hughes v. Eades*, 1 Hare, 486. (c) *Ante* vol. 1, p. 239.

1851. stands, the personal representative of *Walter Turn-*
Baxter
v.
Turnbull.*bull* is a necessary party. This consequence seems
 to us to follow, necessarily, from the allegations in
 the bill. Had the plaintiff alleged merely a purchase
 of this real estate by the partners, it would have
 been necessary for us, in that case, to have consid-
 ered whether an intention to convert it into personalty
 had been evinced, either by the nature of their
 dealings, or by express stipulation. (a) But here the
 allegation in the bill is, in effect, that the partners
 had elected to hold this estate as partnership property.
 An intention to convert is therefore alleged in the
 bill, and affirmed by the admission of the parties,
 which precludes further inquiry.

Judgment.

Then, assuming the equity of redemption to be
 still in the mortgagors, it would be necessary that the
 cause should stand over, with liberty to amend by
 adding parties, (under which it would be competent
 to the plaintiff to amend by shewing the absent parties
 not to be necessary,) and also to exhibit an interroga-
 tory for the purpose of proving *McCaul's* absence,
 and perhaps, the plaintiff's inability to serve him
 with process, if required by the practice.

The defendants, however, assert that the equity of
 redemption is now vested in *Crombie*, under the
 sheriff's deed. But that case is neither alleged by
 the bill nor proved; and it is obviously impossible to
 bind those against whom the bill has been taken *pro*
confesso by the admission of the parties now before
 us. Still, if the facts be as represented, it may be
 competent to the plaintiff, perhaps, to remove the
 difficulty by dismissing the bill as against the mort-
 gagors. Should the plaintiff be advised to adopt
 that course, questions will arise upon which we
 pronounce no opinion at present. Was the sale

(a) *Randall v. Randall*, 7 Sim. 271; *Cookson v. Cookson*, 8 Sim.
 529; *Houghton v. Houghton*, 11 Sim 491; *Custance v. Bradshaw*, 4
 Hare, 315.

effectual? Should the judgment have been revived? 1851.
Is an equity of redemption, circumstanced as in the present case, within the statute? Is to be treated for that purpose, as personal or real estate? *Custance v. Bradshaw* and the appeal in the matter of *Baxter (a)* have a bearing upon the latter question.

Baxter v. Turnbull.

WHITTEMORE V. RIDOUT.

Practice—Injunction.

Where an action at law had been brought by a building society against June 27.
" W. as surety for the secretary of the building society; and W. filed a bill to restrain the action, founding his equity on a resolution or minute alleged to have been passed or made by the board of directors in the following terms—" That Mr. W. had requested that his security for the secretary might be cancelled * * * It was suggested also, that Mr. R. W's name should be erased from the said bond by wish of the board, and both be relieved from securities. Mr. T. was requested to submit two other names as securities in place of the two gentlemen named"—the Court held that such a resolution afforded no ground for interfering with the action at law. October 3.

The bill in this case was filed on the 9th day of April 1851, by *Ezekiel Francis Whittemore* against *Joseph D. Ridout* as president, and *William B. Crew* as treasurer of the *Farmers' and Mechanics' Building Society*, and the said society; and set forth, that after the society had been constituted, one *A. B. Townley*, had been appointed the secretary and treasurer thereof: whereupon, plaintiff and others had become surety for the faithful discharge of the duties as secretary and treasurer by *Townley*, and executed a bond in the penal sum of 1000*l.*; that the accounts of *Townley* had been duly passed and audited up to the 31st day of January 1850; that in the month of March following, the plaintiff having been desirous of being relieved from all liability in respect of his bond and surety for *Townley*, had frequently applied, both verbally and in writing to the president and directors of the society for that purpose, and thereupon the

Statement.

1851. president and directors in the said month of March, and frequently *before and afterwards*, agreed to such application of the plaintiff; and for the purpose of carrying such agreement into effect, they had caused an endorsement to be written on the said bond for the purpose of being signed and sealed by the president of the society, but that by the neglect of the president the endorsement had never been duly signed; but notwithstanding, the president and directors of the society intended the discharge of the plaintiff to be complete and effectual, *and was regarded and acted upon as such.*

Whittemore
v.
Ridout.

Statement.

The bill further alleged, that at a meeting of the society, held in May 1850, with the view of giving effect to the said agreement for the discharge of the plaintiff, a resolution of the board was duly passed and entered in the books of the society, to the effect that he should be so discharged; and that at the next meeting in the month of June following, the order so passed and entered was confirmed, and that *Townley*, by the direction of the board, had written a letter to plaintiff in the following words:—

“TORONTO, 30th July, 1850.

“E. F. WHITTEMORE, Esq.

“SIR:—I am instructed to furnish you with the following extract from a minute of a meeting of the board of directors, held on the 28th day of May last. ‘Ordered: That *E. F. Whittemore, Esq.* be relieved from his securities for Mr. *Townley* to the *Farmers’ and Mechanics’ Building Society.*’”

All of which proceedings were considered by the society as effectuating the complete discharge of the plaintiff, and for that reason, no formal release had been executed.

The bill then stated, that in March 1851, the president and directors of the society commenced an action at law against the plaintiff upon the said bond, for the recovery of the sum of 900*l.*, alleged by them

to have been received by *Townley* and not accounted for to the society; pretending that inasmuch as no formal release had been executed of the bond, plaintiff still remained liable under it, and that they refused to confirm the agreement so made for the discharge of the plaintiff. The bill prayed that the said agreement might be specifically performed, and an injunction to stay proceedings in the action at law.

1851.

Whittemore
v.
Ridout.

The common injunction had been obtained for want of answer.

On the 20th of May the answer of the defendants was filed, whereby they admitted that *Townley's* accounts had been audited and passed up to the time mentioned in the bill, but alleged that the same were procured by him to be so audited by fraud and misrepresentation, the said accounts being in truth false and incorrect. They denied any agreement having been made to release the plaintiff from his suretyship; also, the endorsement of discharge, endorsed on the bond, by the authority of the society, although it appeared that a memorandum of discharge had been drawn on the bond by *J. W. Muttlebury*, the attorney of the company, in the expectation that *Townley* would submit and procure to be accepted a surety in the place of the plaintiff, but that the defendants never considered him discharged from the bond. The answer then set forth, that on the 23rd of May, 1850, a meeting of the directors of the company took place, at which it was stated by the said *Muttlebury*, and was entered on the minutes of such meeting, "that Mr. *Whittemore* had requested that his security for the secretary might be cancelled, he, Mr. *Whittemore* having at the same time begged Mr. *Muttlebury* to assure the board that his confidence in, and respect for Mr. *Townley* remained unshaken, and that it was only in consequence of peremptory clauses in a new deed of partnership, that bound all

Statement.

1851. the partners to be bondsmen for no one," and immediately following was the entry. "It was suggested also, that Mr. *Robert Williamson's* name should be erased from the said bond by wish of the board;" whereupon, a resolution of the said directors was passed, whereby "Mr. *Townley* was requested to submit two other names as securities in place of the gentlemen named;" that subsequently to such meeting, *Townley* fraudulently interpolated after the words "by wish of the board" in the said minutes, the words "and both be relieved from securities," so that the minutes then read thus—"it was suggested also, that Mr. *Robert Williamson's* name should be erased from the said bond by wish of the board, and both be relieved from securities;" that *Townley*, without any direction from, or authority of the board wrote the letter set forth in the bill, for the purpose of inducing plaintiff to believe that he remained no longer liable under his bond; that no such resolution as that stated in such letter to have been passed ever was in fact passed.

Whistmore
v.
Ridout.

Statement.

In addition, an affidavit made by several of the directors of the company, corroborating in a great measure the statements in the answer, was filed, and the defendants gave notice of motion to dissolve the injunction.

In opposition to the motion, the plaintiff filed an affidavit of the former secretary *Townley*, and an affidavit made by the plaintiff, to which was annexed the letter from *Townley*, under date of July 30th, 1850; these, however, did not shew any additional facts of importance, except that after the reception of such letter, plaintiff had frequently applied to *Muttlebury* for a formal release; that he (*Muttlebury*,) told plaintiff he was wholly discharged and that no formal release was necessary; and *Townley* swore that at the meeting of the board held on the 28th of May,

"Mr. *Whittemore* (meaning the plaintiff) and one 1851.
Mr. *William* were ordered to be relieved from ^{Whittemore}
their sureties. Mr. *Townley*, and that officer was ^{v.}
instructed to lay two other names before the board ^{Ridout.}
for their acceptance," and that the plaintiff's dis- ^{Statement.}
charge was not contingent on *Townley's* furnishing
other sureties. On the motion coming on for argu-
ment—

Mr. *Crooks*, appeared for the plaintiff.

Argument.

Mr. *Vankoughnet*, Q. C., and Mr. *Strong*, for the
defendants.

THE CHANCELLOR.—The application to dissolve ^{October 3.}
the common injunction in this case was rested, as I
apprehended the argument, upon two grounds. It
was contended, in the first place, that the entry upon
which the plaintiff relied as constituting an equitable
release was not in truth a minute of any resolution ^{Judgment.}
of the directors of the *Farmers' and Mechanics'*
Building Society, but had been improperly altered by
the secretary without the authority of the board; and
it was argued, secondly, as a matter of law, that this
resolution, if accurate, was but a voluntary under-
taking on the part of this corporation, which being
incomplete, would not be enforced by this court.
Cross v. Sprigge (a) and the cases collected by
Messrs. *White* and *Tudor* in their note to *Ellison v.*
Ellison, (b) were cited.

But the motion does not seem to us to depend upon
either of those questions. Did our determination
turn upon the matter of fact—did this minute, as it
now stands, import in our opinion that the directors
had resolved at that date, and through the medium
of their then resolution, to release the plaintiff from
liability under his bond—then, although the evidence

(a) 6 Hare, 552. (b) 1 White and Tudor's Leading Cases, 167.

1851. upon that point appears to preponderate greatly in favor of the defendants, still it might have been proper, possibly, that execution should have been restrained upon some terms until the hearing. On the other hand, before determining the case in favor of the plaintiff upon the question of law, he must have established a preliminary proposition which was not, so far as I remember, discussed. He must have convinced us of an equity—not originating in the nature of the contract between these parties, but growing out of the imperfection of its form—an equity originating in such a circumstance, to have that declared to be in this court an effectual contract, binding upon this corporation, which in a court of law would be treated as void of all binding efficacy, as wanting the corporate seal. (a) I do not mean to decide now against that equity, but it would have been necessary to have considered it with reference to the authorities upon the subject.

Whittemore
v.
Ridout.

Judgment.

But the present motion, as I have said, does not seem to us to involve either of those points. The resolution of the board, as it now stands upon the minute book of the corporation, is in these words:—

“Mr. *Muttlebury* submitted that Mr. *Whittemore* had requested that his security for the secretary might be cancelled, he, Mr. *Whittemore*, having at the same time begged Mr. *Muttlebury* to assure the board that his confidence in, and respect for Mr. *Townley* remained perfectly unshaken, and that it was only in consequence of peremptory clauses in a new deed of partnership that bound all the partners to be bondsmen for no one.”

“It was suggested also, that Mr. *Robert William*—

(a) *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Paine v. Strand Union*, 8 Q. B. 326; *Lamprell v. Bellericay Union*, 3 Ex. Rep. 283; *Ambrose v. Dunmow Union*, 9 Beav. 508; *Kirk v. The Guardians of Bromley Union*, 2 Phil. 640.

son's name should be erased from the bond by wish 1851.
of the board, and both be relieved from securities."

Whittemore
v.
Ridout.

"Mr. Townley was requested to submit two other names as securities in place of the gentlemen named, before the board at a future day."

Now, assuming that minute to express truly a resolution actually come to by the board of directors, and, assuming it to have been altered, not after the meeting of June, as is alleged, but before that meeting; it seems to us as quite incapable of the construction put upon it by the plaintiff. That entry most certainly does not expressly declare that the board of directors had resolved to release the plaintiff from liability under his bond, at that time, and by means of that act, or by means of any merely formal deed to be executed in pursuance of it. It does not expressly declare any such resolution, but in our opinion, it imports the very reverse. The minute, ^{Judgment.} properly construed, appears to us, to prove that the directors had not formed any such resolution. Omitting the words, the authenticity of which is questioned, there would be no room for argument; but retaining them, the inference attempted to be drawn is not in our opinion justifiable.

The second paragraph, strictly construed, states merely that the release of these parties *had been suggested* to the board, as something to be done in future; and that construction, the strict grammatical one, as it appears to us, agrees perfectly with the intendment of the parties to be gathered from the whole entry. It does not import a present release, but something preparatory to a release to be executed at a future period.

The conclusion at which we have arrived, is certainly irreconcilable with the affidavit of Mr. Townley. The order of the 28th of May, as stated

William-

Paine v.
Ex. Rep.
The Guar-

1851.
Whittemore
v.
Ridout.

in his deposition, agrees with the entry in what has been termed the "rough memorandum book." It is difficult to account for the discrepancies in these several entries. Mr. Townley had a deep personal interest in that proceeding. Yet the formal minute, as at first prepared, contains nothing which upon the most forced construction could be construed as a present release; and after the amendment, it falls far short of the entry in the rough memorandum book. But, whatever may be the true explanation of this difficulty, it is quite obvious that in determining what the resolution of the 28th of May was, we must look at the formal record of the proceedings of the board on that day, as it was submitted to and approved by the succeeding meeting, and not at the entry in this rough memorandum book, the very existence of which was not known to the directors until after the occurrence of the important circumstances out of which this suit has originated.

Judgment.

It is alleged, however, that what was done was intended to operate as a release, and was always so treated by the president and directors. Without stopping to enquire what would be the effect of that state of facts, if established, it is sufficient to say that the truth of the allegation has been denied by the president as well as by all the directors concerned in the transaction, with the exception of Mr. Muttibury who has not made any deposition.

We are of opinion, therefore, that the equity has been completely displaced, and that this injunction must be dissolved.

* The entry in the rough memorandum book was as follows:—
"Messrs. Whittemore and R. Williamson were ordered to be relieved from their securities for Mr. Townley, and that officer was instructed to lay two other names before the board for acceptance."

HUTCHISON V. RAPELJE.

1851.

Specific Performance—Costs.

Hutchison

v.
Rapelje.

Statement.

The steps which the vendee of an estate, who desires the specific performance of the contract of sale, should take before filing a bill for that purpose, in order to entitle him to the costs of the suit, considered.

The bill in this cause was filed on the 19th of February, 1851, by *Roger Hutchison* of Zorra, against *Henry V. A. Rapelje*, for the specific performance of a contract for the sale to plaintiff of 100 acres of land in that township, if it should appear that the defendant (the vendor) could make a good title; if not then the bill prayed that the contract might be rescinded and the purchase money repaid, as is more fully stated in the judgment of the court.

Mr. *Crickmore* for the plaintiff.

Argument.

Mr. *Galt* for the defendant.

Harrison v. Coppard (a), *Lewin v. Guest* (b), *Bennett College v. Carey* (c), *Lewis v. Loxham* (d), were cited.

THE CHANCELLOR.—On the 24th of January 1849, ^{October 2.} the defendant sold to the plaintiff the south half of lot 23 in the 16th concession of Zorra, for the sum of one hundred pounds, one half to be paid in hand, the residue in two instalments of 25*l.* each, on the 24th ^{Judgment.} day of January in the years 1850 and 1851.

This agreement was reduced into writing in the form of two bonds; that from the plaintiff a money bond condition for the payment of the specified instalments; while, by the other, the defendant obliged himself, "upon payment of these instalments, to sign, seal and deliver a good and sufficient conveyance, in fee simple, of the property in question, free from incumbrances."

(a) 2 Cox. 310. (b) 1 Russ. 325. (c) 3 B. C. C. 390.
(d) 3 Mer. 429.

1851. The defendant was let into possession. He failed to pay either of the instalments; but on the 26th of July, 1851, his solicitor addressed the following letter to the defendant:—

Hutchison
v.
Rapelje.

“ Woodstock, 29th January, 1851.

“ Sir,—I have been instructed by Mr. *Roger Hutchison* to communicate with you on the subject of a lot of land (south half 23, 16 con. Zorra), of which he requires a deed under your bond, (in my hands,) and upon which the sum of 56*l*. is now due and ready for you. In investigating the title some difficulty occurs. The patentee was Mr. *Mc-Taggart*, the next entry is a certificate of sale from the sheriff, then a deed from the sheriff to *A. B. Rapelje*, both dated 27th February 1849. Now, if this was in fact a purchase by the sheriff himself, I could not approve of the title; at any rate, the legal estate appears to be from the sheriff's deed in *A. B. Rapelje*, this deed bearing date September 1849, and your bond 24th January 1849. But I assume all this is susceptible of satisfactory explanation; this afforded and a deed (the dower must of course be barred) sent to Mr. *Hugh Barwick* the cashier of the Montreal Bank here, or to any agent you may have here, the purchase money will be paid. I shall be glad of an early communication.

Judgment.

“ J. F. MADDOCK.”

The answer to this letter has been mislaid, but Mr. *Maddock* swears that it was to “the effect that he would afford Mr. *Maddock* no explanation, but would see and settle with the plaintiff himself.”

The precise dates at which the letter and answer were received are not shewn.

The bill was filed on the 19th of February following. It states that the title had, upon investigation, been found deficient; that the defendant had been applied to to rescind the contract and refund the purchase money, but had refused; and prays that the contract may be specifically performed if a good title can be made; if not, that the contract may, in that case, be rescinded, and the purchase money repaid.

The answer states, that the sheriff of the London District sold the parcel of land in question for taxes, in the year 1832 or 1834, to *Abraham Bogart Rapelje*, and executed a certificate of that fact on the 9th day of April, 1837—that, on the last mentioned day, *Abraham Bogart Rapelje* conveyed all his interest in the premises to the defendant—and that, in pursuance of such certificate and assignment, the sheriff, by deed poll under his hand and seal of office, duly conveyed the premises to the defendant on the 9th day of April 1838. The answer further states, the deed of September 1849, from the sheriff to *Abraham Bogart Rapelje*, to have been executed in mistake, and alleges that he had, for the purpose of correcting such error, by an indenture executed on the 21st day of March last, conveyed all his interest in the premises to the defendant.

1851.
Hutchison
v.
Rapelje.

These facts are not denied. The plaintiff, as I understand the matter, is willing to accept the vendor's title without reference. The only matter for our consideration, therefore, is the question of costs. Upon that point I have hesitated. The parties have acted under misapprehension. There is no moral wrong on either side. The expense of a litigation, which seems to have been unnecessary, must be borne, in any event, by an innocent party. Under such circumstances, any conclusion at which the mind arrives is adopted with hesitation.

Judgment.

The plaintiff argues that he was justified, under the circumstances, in placing this bill upon the file on the 19th of February, and he contends that the defendant acquired his title subsequent to that step, and must therefore pay the costs to the period when a good title was shewn (a).

(a) 2 Sugden V. & P., Pp. 624, 626, [11th Ed.]; Townsend v. Champenowne, 3 V. & C., 505.

1851.
Hutchinson
v.
Rapelje.

We are of opinion, upon the facts admitted in argument, that the defendant had a good title prior to the filing of this bill. This had not been a registered title in 1838. The deed poll executed by the sheriff at that date vested an estate in fee simple in the defendant; and the deed of 1849 was, under the circumstances, wholly inoperative. The defendant, therefore, does not derive title under the deed, executed by *A. B. Rapelje* after the filing of the bill, and the principle relied on by the plaintiff consequently does not apply.

Judgment.

But, assuming that to be so, the question still remains—has the bill been filed prematurely? The plaintiff, in my opinion, did not waive his right to call for a good title by taking possession under the circumstances of this case. The defendant contracted, I think, to make a good title upon payment of the instalments. Possession was taken upon the execution of the contract by arrangement between the parties. In accepting possession under such circumstances, and at that period, the plaintiff cannot be properly regarded, in my opinion, as having thereby waived a stipulation not then ripe for execution, but only to be performed, by express agreement at a future period (*a*). The plaintiff, therefore, had a clear right to call for an abstract of title on the 26th of January 1851. It is true that he was then in default. But plainly the delay was not such as to forfeit his right to specific performance (*b*). Had the defendant refused to proceed, on that ground, such refusal would, I think, have been unjustifiable. Under these circumstances, Mr. *Maddock's* letter of the 26th of January was, I think, quite unexceptionable. The facts disclosed by the registry were well calculated to awaken a suspicion of the title. The

(*a*) *Morin v. Wilkinson*, ante 157. *Prindle v. McGan*, 4 U. C. Q.B. 228. (*b*) *O'Keeffe v. Taylor*, ante.

solicitor candidly explains the difficulty he had encountered in the course of his investigation ; at the same time he invites explanation ; informs the defendant that his purchase money is ready ; and offers, as it seems to me, every facility for carrying out the contract.

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v.
Rapelje.

Now, had the defendant only failed in proper diligence ; had he even neglected altogether to reply to this letter, I would have been of opinion, I think, that a bill filed on the 19th of February, without more, would have been premature. It would have been incumbent on the plaintiff, probably, under such circumstances, to have again called the defendant's attention to the subject—to have appointed a reasonable time for the delivery of an abstract—and to have indicated the necessity of ulterior measures in case of default. But things did not take that turn. The defendant did reply to that letter promptly ; but, as the answer has been represented, in a way quite unjustifiable. He declined, as it is sworn, to offer any explanation to the solicitor, but expressed an intention to see the plaintiff himself. That was not a course which can, in my opinion, be justified. The state of the title, as disclosed by the registry, was far from satisfactory. The call for information was courteous. The duty could only have been performed satisfactorily by a professional gentleman. At all events the plaintiff had a right to avail himself of such assistance. The defendant had not the option to repel that application in the way which I have described. But assuming him to have had that option, he did not embrace the alternative which he had himself presented. Refusing altogether to offer any explanation to the plaintiff's solicitor, he neglects to communicate with the plaintiff himself, and the bill was filed after the lapse of three weeks. Now, although a further application from the solicitor would have removed all doubt, I cannot say that it

Judgment

1851. ^{Hutchinson} ^{v.} ^{Rapelje.} was incumbent on him to take that course. Judging from the tone of the first communication, I believe that this suit would never have been instituted had that letter been met in a similar spirit. The reply was calculated to warrant the conclusion that further communication would be fruitless. I cannot say that the bill, under such circumstances, was prematurely filed. And I am therefore of opinion that the defendant must pay the costs of a suit necessitated by conduct on his part, as it seems to me, unjustifiable.

ESTEN, V. C.—*Currah v. Rapelje, Hutchinson v. Rapelje.* These bills are filed to rescind two contracts for the sale of certain lands on the ground of the alleged badness of the title, which is the same in both cases. They necessarily pray however in the first instance, that the contracts may be specifically enforced if the title should appear to be good. A reference of the title would be a matter of course in each suit, but this is waived by the plaintiffs, who are respectively willing now to accept the title. The contracts therefore must be specifically performed, and the only question relates to the costs. An application was made to amend the bill in each suit, and upon the hearing of these motions, it was arranged between the respective counsel and solicitors of the parties, that that should be considered as the hearing of the cause, and that the court should dispose of the suits according as it thought that the amendment should or should not be made, and according to the facts as they should thus appear to be. The application to amend in *Currah's* case, should be refused—the matter of the proposed amendment being wholly immaterial in that suit. I think also that *Currah* should pay the costs of the suit. He has filed a bill without even demanding an abstract of title, and the defendant comes forward and says that his title is good, and that he has always been prepared to shew that it was so, and to complete his

Judgment.

contract. The case of *Hutchison v. Rapelje* is somewhat different. I think in that case the matter of the proposed amendment is material. It appears in this case, that Mr. *Maddock*, the plaintiff's solicitor, addressed a very proper request to the defendant for an abstract of his title. To this application the answer was, that the defendant declined to communicate with Mr. *Maddock*, but would settle the matter with the plaintiff. This answer was improper. The defendant had no right to refuse to communicate with Mr. *Maddock* on the matter, and if he had given to this gentlemen, by letter, the information contained in his answer, the suit would have been prevented. The plaintiff however waits a short time, and hearing nothing from the defendant files this bill. On the other hand, the plaintiff's proceedings have been rather prompt, and the principal object of this suit fails. Had the application to amend stood by itself, I should have thought that the plaintiff should have paid the costs of it. As it is however, the defendant derives benefit from the application, and under the circumstances, I think the justice of the case will be met by decreeing a specific performance without costs.

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Hutchison
v.
Rapelje.

Judgment.

SPRAGGE, V. C.—The question in this case is merely one of costs. The bill was filed under an apprehension that a good title could not be made by the defendant to the plaintiff, but the plaintiff is now satisfied that a good title can be made.

I think the bill was filed somewhat hastily. Mr. *Maddock's* letter to the defendant bears date at Woodstock, the 20th of January last, and was addressed to the defendant at Simcoe. The defendant's answer has been lost—its date, or when it reached Mr. *Maddock*, does not appear. In it the defendant, as appears by Mr. *Maddock's* affidavit, declined to explain his title to him, but said that he would see

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Judgment.

and settle with the plaintiff himself. The plaintiff, as appears by the bill, lives in the township of Zorra, in the county of Oxford. The bill was filed on the nineteenth of February, at Toronto. It would have been better if the defendant had explained to Mr. Maddock how the title stood, but he probably thought it was a matter easily explained to the plaintiff himself, and that the intervention of a legal adviser would be unnecessary. No further communication was made to him before the filing of the bill. The letter from Mr. Maddock was written in his capacity of a conveyancer. His not replying to the defendant's letter might, not unreasonably, have led to the inference that he acquiesced in the defendant's seeing and settling with the plaintiff himself. If he insisted upon an explanation to himself, and was instructed to file a bill in the event of the title not being cleared up, his course should have been, as I conceive, to have written a letter to that effect to Mr. Rapelje. He comes now, admitting himself satisfied with the plaintiff's title, to claim costs against him, not because he has or had then a ground of suit, but because the defendant did not explain his title to him, but said he would see and settle with the plaintiff. The plaintiff was scarcely in a position to take so stringent and peremptory a course against the defendant. The second instalment of his purchase money had been overdue for a twelvemonth. The language of the bill would imply that the plaintiff had abstained from making any payment after the first, in consequence of an apparent defect in the title, but so far as appears, this apparent defect was not discovered till about a twelvemonth after the second payment fell due, or at all events, was not till then communicated to the plaintiff, and then by Mr. Maddock's letter. The suit was not necessary; though Mr. Maddock, uninformed of the facts, thought that it was. A little patience and forbearance would have shewn it to be unnecessary, and I think the plaintiff ought not to have the costs of it.

If a defendant be aware of facts which render a suit unnecessary, (such facts being unknown to the plaintiff,) and with every reasonable opportunity afforded him of making known those facts, refuses to do so, he cannot complain if he is made to pay the costs of a suit which his own obstinacy or neglect has brought upon him. It is because, in my opinion, this suit was instituted with less than such reasonable opportunity being afforded to the defendant, that I think the plaintiff ought not to have his costs. There was no absolute refusal to explain the title, and a second letter requiring it to be made to Mr. Maddock, and threatening a suit if not done, would have been no more than was reasonable under the circumstances. A solicitor's letter before suit, is contemplated by our practice—a fee is set down for it in the tariff of costs. No such letter was ever written in this case.

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v.
Rapelje.

Judgment.

I do not say that a plaintiff having cause of action is to be refused his costs, unless his solicitor first writes what in common parlance is called a lawyer's letter. That is not this case. Here the plaintiff only believed that he had a cause of action. The defendant was in possession of facts which such a letter would in all probability have drawn from him, which would have shewn his title to be, as it now appears to be, satisfactory to the plaintiff.

At the same time, I think the defendant would have acted more correctly in explaining at once to Mr. Maddock the nature of his title, and for that reason I think he should not be paid his costs. I think neither party is free from blame, and that it is right that each party should pay his own costs.

Per Cur.—Specific performance of the contract set forth—decreed without costs.

1851.

August 29.
October 3.

CURRAH V. RAPELJE.

Specific performance—Costs.

Where before the expiration of the time appointed by a contract for the payment of the purchase money of a lot of land, the vendee became dissatisfied with the title of his vendor, as it appeared on the books of the registry office of the county, and, without any communication with the vendor, filed a bill to rescind the contract, or to have it specifically performed if it should appear that the vendor could make a good title; and at the hearing, the plaintiff (the vendee,) expressed his willingness to accept the title: the Court, with the consent of the defendant, offered the plaintiff a decree for specific performance on payment of costs, or if that refused, ordered that the bill should be dismissed with costs.

Statement. The facts of this are similar to those of *Hutchison v. Rapelje*, except that in this case, owing to the answer given by the defendant when applied to on behalf of *Hutchison*, no communication was ever made to the defendant before filing the bill.

Argument. Mr. *Crickmore*, for plaintiff.

Mr. *Galt*, for defendant.

October 3. THE CHANCELLOR.—This case resembles in several particulars the one of which we have just disposed. It differs in this, that the time for payment of the last instalment has not yet arrived, and while the plaintiff, on the one hand, has not been guilty of any default, on the other hand, he neglected to make any application whatsoever to the defendant before instituting the present suit.

Judgment. Upon the principles explained in *Hutchison v. Rapelje*, I am of opinion that the plaintiff did not, by taking possession, waive his right to call for a good title. And upon the peculiar form of the contract, it would have become the duty of the defendant, I think, upon due payment of the instalments to have prepared and tendered a proper conveyance. According to English authorities, the preparation of the conveyance, and the attendant expense, upon an ordinary contract of sale, would devolve upon the pur-

chaser. (a) And so it would in this province, probably, under similar circumstances. But the defendant has bound himself, upon payment of the instalments, to "make, execute and deliver a free, perfect and absolute conveyance in fee simple of the premises in question," and he could not discharge himself of that, but by preparing and executing a proper deed. (b)

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Currah
v.
Rapelje.

But, assuming the law to be so, and taking it for granted that it was competent to the plaintiff to have filed the bill prior to the time given for payment of the last instalment—upon which I express no opinion—still, the defendant had been guilty of no default whatsoever when the bill was filed. It is admitted that he can now make a good title. The time fixed by the contract for that purpose has not yet arrived; and, although it were competent to the plaintiff at any moment during the pendency of the contract, to require the defendant to deduce a good title, still, necessarily, from the very nature of the thing, that would only become the duty of the defendant upon a proper demand on the part of the plaintiff. It is obvious therefore, that the bill has been prematurely filed. One readily perceives that the solicitor for the plaintiff may have been inadvertently betrayed into this step from considering this and the former case as depending upon the same title. But the cases are quite distinct. Each must be disposed of upon its own merits. All parties consenting, a decree for specific performance may be pronounced, but in that case the costs must be paid by the plaintiff, otherwise the bill must be dismissed with costs.

Judgment.

SPRAGGE, V. C.* concurred.

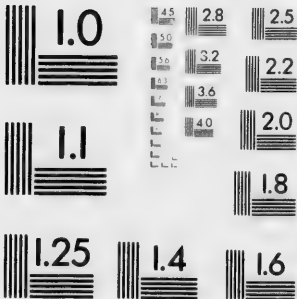
(a) *Stephens v. DeMedina*, 4 Q. B. 422. (b) *Comyn's Digest*, Condition H.; *Monck v. Stuart*, 4 U. C. Rep. 203.

*For the views, of *Estlin*, V. C., see his judgment in *Hutchison v. Rapelje*.



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1851.

MENZIES V. RIDLEY.

June 27, &
October 24.

In an administration suit, it appeared that the stepfather of one of the children of the deceased, and who had the care of such child, had been sued for the child's board while at school, his mother being a creditor of the estate and neither she nor her husband having any funds to pay for such board, while there were funds applicable thereto.

Held—that the stepfather should be allowed the costs of such suit. A testator's sister having procured a marble slab to his memory—his widow who was the acting executrix of his will having in hand no funds of the estate, gave her note to the sister for the price which was moderate in reference to the estate and degree of the deceased, but the note had not been paid, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees: The question did not affect creditors of the deceased, and it was not pretended that the estate was liable for the note or for the price of the slab. *Held*—under these circumstances, that the amount should be allowed to the executrix.

An executor is entitled to interest on moneys advanced by him out of his own means and properly expended in the management of the estate.

In an administration suit, the widow of the testator had made a claim for dower, which had been allowed; and upon an appeal from that decision, the Court of Appeal reversed the judgment of the court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of the appeal; the appellants having paid their own costs of the appeal, this court upheld the finding of the Master in allowing them such costs out of the estate.

Statement. This cause now came on upon an appeal from the Master's report; and on further directions, the facts and the arguments of counsel are sufficiently stated in the judgment.

Argument. Mr. *Turner*, for the plaintiff.

Mr. *Vankoughnet*, Q.C., for the defendant.

Fearn v. Young (a), and *Beames* on costs, page 157, note p., and page 216, were cited on the question of costs.

October 24. SPRAGGE, V. C.*—In this matter several questions are presented for decision.

Judgment. 1st. As to the item of 31*l.* 8*s.* 1*d.*, being the amount which the plaintiffs claim, that the estate ought to

(a) 10 Ves. 184.

*The Chancellor and Esten, V. C. had been concerned in this cause while at the bar.

pay to satisfy a judgment obtained by Mrs. *Anne Henderson* against the plaintiff *Alexander Menzies*, for the board of testator's son, *Thomas Swainston Campbell*, while receiving his education at Upper Canada College, and for interest and costs. Upon this item the Master finds that it was a debt incurred on behalf of the testator's estate; that the testator's estate should pay the same, and that *Alexander Menzies* had no funds in his hands belonging to the testator's estate wherewith to pay the said debt since the same became due.

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v.
Ridley.

• It is suggested on behalf of the defendants *Ridley* and *McAnnany*, that young *Campbell* might have been placed at the College Boarding House, where, as it is said, the charge for board is less, and further, that if the debt for board be allowed, the interest and costs should be disallowed. I do not see that it appears upon the evidence that the cost of board in the College Boarding House is materially, or indeed at all less than at Mrs. *Henderson's*; but, assuming it to have been so, the plaintiffs (the female plaintiff being the boy's mother,) thought proper to place him at Mrs. *Henderson's*, not objected to as an extravagant or expensive boarding house. Whether this was before or after the defendants *Ridley* and *McAnnany* assumed the guardianship of testator's children under his will, does not appear. If before, it was a matter fully within the discretion of the boy's mother. If subsequently, it might still reasonable be considered to be within her discretion, the children continuing under her care and control, and this boy being placed and continued at Mrs. *Henderson's* without, so far as appears, any objection on the part of the testamentary guardians.

Judgment.

It appeared too that the boy was by no means robust, and his mother may have considered, and that rightly, that a private boarding house such as Mrs. *Henderson's*, was a more fit place for him than

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the boarding house of a large public school. As to the disallowance of interest and costs, the Master finds that *Alexander Menzies* had no funds in his hands wherewith to pay the debt since it became due, and it also appears by the report that Mrs. *Menzies* was a creditor upon the estate for nearly 500*l*. In 1845, *Ridley* and *McAnnany* assumed the receipt of the rents and profits of the estate, which they had allowed the plaintiffs to receive since their intermarriage in 1842. If the debt in question was incurred since 1845, as was probably the case, the plaintiffs would naturally look to *Ridley* and *McAnnany* for the means of discharging it, the rents and profits amounting to a considerable sum—about 300*l*. a year. At all events, the plaintiffs had no means wherewith to discharge the debt. It was not, so far as appears, any fault of theirs that interest had accrued and costs have been incurred upon this debt.

Judgment.

I think the Master is right in his finding that the item in question should be paid by the testator's estate.

Another item is 24*l*. 13*s*. 6*d*. for a marble slab to the memory of the testator, and which the Master has disallowed. The Master finds that the late *Margaret Campbell*, testator's sister, had paid 24*l*. 13*s*. 6*d*. for a marble slab to be erected to the memory of the said testator, and that his widow, subsequently considering that the expense of said slab should be borne by the estate, gave her commissary note to the said *Margaret Campbell* for the said sum, which is not yet paid.

It does not appear upon what ground the Master disallowed this item; whether because the slab had been prepared at the expense of the testator's sister, and so that it might have been erected without expense to the estate, or because Mrs. *Menzies* has not yet paid the note which she gave to the testator's sister

for the amount, or generally, on the ground that an executor cannot claim against an estate the cost of a gravestone or slab. It is not pretended that the slab in question was unsuitable to the degree and station in life of the deceased, or that the cost was unreasonable, considering the estate left behind him. The claim is not contested by creditors, but by the testamentary guardians of the deceased.

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Ridley.

The circumstance of the slab having been prepared at the expense of testator's sister, is not, I think, a good ground for resisting this claim. The testator's widow was the sole acting executrix of her husband's will; *Ridley* and *McAnnany*, though appointed executors, never (as they say in their answers) acted as executors or intermeddled with the estate. She, considering that the expense of the slab ought to be borne by the estate, purchased it of testator's sister. I think she was right in considering that the estate, which was bequeathed to herself and her children, should bear the expense of a slab to the memory of her husband and their father. I think she would have been justified in refusing to allow it to be erected except at their expense; to have procured a slab elsewhere if the one prepared for the sister was unsuitable, or if she had refused to part with it; and consequently that she was justifiable in taking it off the hands of the sister at the expense of the estate.

Judgment.

It is not unusual for a slab to express by whom it is erected. If this had been erected by the testator's sister, it might have contained an inscription to that effect, which would be read by many as conveying a reproach to those whose immediate duty it was to erect such memorial, and who had neglected that duty and left it to another, by whom it had been performed. It is not because another volunteers to do that which the estate ought to do, that the representative of the estate must allow it to be done by

1851. such volunteer or be at the expense out of his own pocket. Upon that principle, if the testator's sister had offered to pay one of his debts and the executrix had declined to allow her to do so, and had paid it herself, she could not have been allowed that payment against the estate.

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v.
Ridley.

The Master finds that the executrix has not paid the note which she gave for the purchase of the slab. If however, the estate is exonerated, that I conceive is sufficient, upon the authority of the case of *Hepworth v. Hislop* (a). She had no funds of the estate to pay for the slab, but on the contrary was, and still is, largely in advance to the estate.

Judgment.

Upon the general question whether an executor procuring a gravestone or slab to the memory of his testator, suitable to his degree and estate, can charge the same against the estate, I do not think there can be much doubt. The charges attending a funeral are allowed to an executor, (except as against creditors,) even where the expenses are considerable, provided they are suitable to the degree and estate of the deceased, and they are allowed, not as being necessary, but because they are so suitable. They are sanctioned as customary marks of respect, as proper to be allowed, because they are so; and it does appear to me that the principle upon which such expenses are allowed applies with still more force and with better reason to an expense incurred (if not immoderate) for a *permanent* memorial of the deceased. Not only is it usual and considered a proper mark of respect, and its omission in some degree a reproach to survivors, but it is useful as marking the place of burial and as furnishing evidence of pedigree.

But if it be proper and usual, that I conceive is

(a) 6 Hare, 561.

sufficient to authorize an executor in incurring the expense, and therefore in being allowed for it out of the estate. In *Rogers' Ecclesiastical Law*—citing 3 Inst. 102—it is said, "Concerning the building or erecting of tombs, sepulchres or monuments for the deceased in church, chancel, common chapel, or church yard, it is lawful, for it is the last act of charity that can be done for the deceased;" and in 2nd Comyn's Digest, under the head "tomb, monument, &c.," it is said, "So an heir or executor may erect or set up a tomb stone or other monument in a convenient place within the church or church yard, for the honor of his ancestor there buried."

1851.

Menzies
v.
Ridley.

I am of opinion that this item should be allowed to the executrix.

Another question arises upon the claim of the executrix to be allowed interest upon the sums advanced by her to the estate. The Master by his report has found that the executrix, from the means come to her hands from the testator's estate, and other means at her disposal not belonging to said estate, expended in the payment of funeral expenses of testator and of debts arising from the estate, and incidental expenses incurred by her in the management thereof, 740*l.* 11*s.* 1*d.*; that she received on account of the estate 250*l.* 14*s.* 10*d.*—so that she expended in funeral expenses, payment of debts and incidental expenses, in managing the estate 489*l.* 16*s.* 3*d.* more than she received. How much of this excess was expended in managing the estate, and how much in payment of debts does not appear; both are allowed as proper expenditures. I think certainly that moneys advanced by an executrix and properly expended in the management of an estate, ought to bear interest. An estate would almost of necessity suffer greatly more, from the want of such expenditure than the interest upon the advances would amount to. To refuse interest to executors for such advances, would.

Judgment

1851. *Menzies*
v. *Ridley*, deter them from expending any moneys in the management of an estate beyond what they might have in hand, however much the estate might need the expenditure, and however much it might be benefited thereby. Of the debts paid, it may be assumed, I suppose, that all were due and payable. Some appear to have been promissory notes, and generally they were of a kind payment of which would be looked for by the creditors, and upon many of which, if not upon all, interest would be claimed, and upon which if sued upon interest would have been recovered. By the executrix paying them out of her own funds, the estate was no doubt benefitted—the amount of interest payable by the estate not increased by allowing interest upon such payments, and costs at law avoided.

Judgment. Certain lands of the testator were devised by his will specially for the payment of his debts. Of these lands, a plot of seventy-five feet frontage in the town of Belleville has not been sold. The ground rent of this land was received by the executrix from the death of the testator in September 1835, to April 1842, when she intermarried with *Alexander Menzies*. With this ground rent she has not been charged.

The testator by his will, after devising the seventy-five feet and some other land to the executrix and to *Ridley* and *McAnnany* in trust for the payment of his debts, and after making other devises and bequests, devised and bequeathed to his widow during her natural life, or so long as she should remain his widow, all the residue of his estate, both real and personal.

The rents and profits of this residue she received without account after the time of her marriage with *Menzies*. But for the rents and profits of the land devised for the payment of debts she was accountable. It does not appear to have been any fault in the

executrix that the plot of ground in Belleville was not sold. The plaintiffs state in their bill that they have frequently applied to *Ridley* and *McAnnany* to come to a settlement with them of the matters in question between them, and to concur in a sale of the lands devised by the testator for payment of his debts. The defendants question the existence of any debt from the estate to either of the plaintiffs, and say they consider the estate sufficient to satisfy its liabilities without a sale of the plot of ground in Belleville. It is not improbable, as suggested in the answer of defendant *McAnnany*, that the executrix made the advances out of her own funds with a view of saving the necessity of selling the plot of land in question, which is represented as valuable and increasing in value; there was no wrong in that. Now, the three co-trustees of this piece of land, having refrained from selling it for payment of debts, and one of them, the executrix, having received certain rents and profits therefrom, such rents and profits should have been applied to the payment of the testator's debts. Whether no charge was carried in before the Master in respect of them because the Master allowed no interest to the executrix upon her advances, I do not know; but considering the executrix entitled to such interest, I think on the other hand she must be charged with these rents and profits. For such portion of them as she received, after interest accrued upon her advances, it is right, I think, to take, as discharging interest so far as interest was in arrear, and the excess in reduction of the principal.

1851.

Menzies
v.
Ridley.

Judgment.

With regard to the costs of appeal, properly paid by defendants *Ridley* and *McAnnany*, they have been correctly allowed to them by the Master. The appeal was successful—a question of great interest to the estate and the children, whose guardian they are, was decided in their favor, and the judgment of the court below, being reversed upon appeal, the costs

1851. of the appellants fell upon them and could not be
obtained from the respondents.

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V.
Ridley.

The plaintiffs ask for their full costs of their suit, as well in respect of the claim for dower upon which the judgment of Vice Chancellor *Jameson* was reversed upon appeal, as in respect of that part of this suit upon which they succeed.

Upon so much of the costs as relate to the claim for dower, the Court of Appeal, as I read their judgment, have themselves decided. They remit the cause back to this court to do therein as shall be just and consistent with the judgment of that court, and to award such costs of this suit so far as the same is directed to be dismissed by the said Court of Appeal, unto the said appellants as by the rules and practice of this court should be awarded against a plaintiff on the dismissal at the hearing of a bill brought in this court in respect of dower. The order of the Court of Appeal awarding to the appellants *such* costs as are awarded in this court on the dismissal of a bill for dower, would not be complied with by awarding to the appellants *no* costs in respect to so much of the bill as is directed to be dismissed. Under this order I apprehend the costs must be apportioned in the usual way, unless indeed the plaintiffs were entitled to no costs in respect of any portion of their suit.

Judgment.

I think the plaintiffs entitled to their general costs of the cause, less so much as has been occasioned by the claim therein made for dower and arrears of dower. I think, with that exception, that all parties are entitled to their costs as between solicitor and client.

The Master certifies that there are divers sums remaining due in respect of debts of the testator due at his death, and of claims for the maintenance and

education of his children, but he does not state the amount so due. An inquiry will be necessary on further directions as to the outstanding claims for debts. A sale must be directed of the seventy-five feet in Belleville, to satisfy these claims, to recoup the executrix her advances, and to pay the costs of this suit. It is not suggested that it will be necessary to resort to any other of the real estate of the testator for this purpose; no case is made for that purpose.

1851.

Menzies
Ridley.

Judgment.

It will be proper also for the Master to inquire and state what will be a proper sum to be allowed for the *future* maintenance and education of the children of the testator.

HOWCUTT V. REES.

Practice—Viva voce examination—Production of documents.

The mere fact of the plaintiff, during the *viva voce* examination of a defendant, producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit.

November 3.

During the examination of the defendant the counsel for the plaintiff put into the hands of the defendant several written documents, said to be letters written several years ago by the defendant, and asked him whose signature was affixed to them. The defendant having answered that the signature was his own, Mr. Gwynne, Q. C., for the defendant demanded a perusal of the papers so shewn to the defendant, with a view to the continuance of the examination of the defendant by his own counsel.

Statement.

Mr. Cameron, Q. C., and Mr. McDonald, for the plaintiff, resisted this demand of the defendant, contending that they had a right thus to prove the signature to the papers, without disclosing their contents—as, for all that yet appeared, the plaintiff might see fit never to produce or make any further use of them;

Argument.

1851. besides, several of the papers now proved were the
 Howett same as the Court had previously refused a motion
 v. for the production of (a).
 Rees.

After taking time to consider, the judgment was given by—

ESTEN. V. C.*—In the course of the defendant's
 November 3. examination in this case, the plaintiff produced various letters and written documents to the defendant, and asked him in whose handwriting they were, without referring to their contents. The defendant, by his own counsel, required these documents to be produced, in order that he might have access to them for the purposes of the suit. Upon consideration however, we think this application must be refused. It was conceded
 Judgment. that the defendant had a right to use the documents in question, for the purpose of his examination on his own behalf, in the same way as they might be used for the cross-examination of a witness who had proved them, but only on the subject of the examination in chief. If he was entitled to their production, he might obtain it upon motion, when any protection which the plaintiff might have against their production might be made available. It appears that, as the plaintiff might have proved the documents in question as exhibits at the hearing, or through the testimony of a witness; and as, under the former practice of the court, he might have proved them by an interrogatory exhibited to a witness for that purpose, without the possibility in any of these cases of the defendant knowing their contents previously to the hearing, the accidental advantage of his being able to ask the defendant as to the handwriting without acquainting him with their contents through the medium of a *viva voce* examination (whereas, under the former

(a) See ante, 268.

* The Chancellor had been concerned in the cause.

practice, if he had required a discovery of them, he must to a certain extent have described their contents and purport in the bill) ought not to oblige the plaintiff to submit to their production. We are, however, of opinion that the defendant having already moved for the production of papers, and the documents in question having been withheld under an affidavit to the effect that they related exclusively to the plaintiff's title, the defendant is not thereby precluded from renewing his application, if he thinks that he can shew, from the tenor of his examination, (if, under the circumstances, *that* should be evidence in his favor) or otherwise, that he is entitled to their production.

1851.

Howcutt
v.
Rees

Judgment.

EVANS V. PARKER.

Practice.—Foreclosure.

Where a bill of foreclosure had been filed by the executor and devisees of the mortgagee, and the executor alone attended at the time and place appointed by the Master for payment of the mortgage money to the plaintiffs; as it did not appear that the debts of the testator had been paid, the Court considered the plaintiffs entitled to the absolute decree of foreclosure in default of payment.

November 7.

This was a motion by Mr. *Hector*, for an absolute decree of foreclosure. The bill stated a devise of the mortgaged premises to a number of persons who were co-plaintiffs with the executor of the mortgagee. It did not appear that the debts were paid. The case had been summarily referred under the 77th order of May, 1850, and the decree directed payment of the money generally to the plaintiffs. The executor alone had attended, at the time and place appointed by the Master's report, to receive the mortgage money. The Court was of opinion that, under the circumstances, the executor could receive the money and give a discharge, and therefore that his attendance was sufficient to entitle the plaintiffs to an absolute order of foreclosure.

1851.

BOWMAN V. BECKTEL.

Practice—Infants.

November 7 The subpoena and notice of motion for the appointment of a guardian had been served on the persons with whom infant defendants were residing; this was considered sufficient service to entitle the plaintiff to move.

This was an application by Mr. *Mowat*, for the plaintiff, to appoint a solicitor of the court guardian *ad litem* to some of the defendants, who were infants. The notice of motion was given on the 1st, for this day, and the service of it, and of the subpoena on the infants had been effected by delivering a copy and exhibiting the original to the persons with whom and under whose care they resided, at the town or village where they resided, without its being shewn that such copies had been left at the place of abode of the infants, or that they had been personally served. Both the notice of motion and service of the subpoena were held sufficient.

WILMOT V. MAITLAND.

Practice—Injunction.

November 11th & 12th Although the Court had refused to grant an *ex parte* injunction to restrain the removal of certain chattels claimed by the plaintiff, and directed notice of motion to be given, an interim injunction was subsequently granted, on an affidavit being filed shewing that the defendants were in the act of removing the property, notwithstanding the notice of motion had been served.

In this case, Mr. *Morphy*, for the plaintiff, applied on the 11th November—*ex parte*—for an injunction restraining the defendants from removing or withholding certain flour stored in the warehouse of the defendant *Maitland*, and claimed by the other defendants. The *ex parte* application was refused, but leave was given to serve notice of motion that evening on the defendants, for three o'clock the next day, and to file an additional affidavit on the following morning; the notice to state that the additional affidavit was filed after service of the notice, by leave

of the Court. On the morning of the 12th, the plaintiff applied to the Court, in consequence, as he stated, of the defendant's being in the act of removing the flour; and upon the plaintiff making an affidavit of the service of the notice of motion, and of the removal of the flour by the defendants, an interim order was granted restraining the removal of the flour until the hearing of the motion.

1851.

Wilmot
v.
Maitland.

ROWSSELL v. HAYDEN.

Trustee—Costs—Parties.

When a trustee is required by his *cestui que trust* to convey to the latter June 15, and the trust lands, in a case in which such a conveyance would be proper, October 17. it is the duty of the *cestui que trust* to solve all reasonable doubts suggested by the trustee as to the course he is desired to pursue; and the *cestui que trust* must also pay all costs, charges and expenses properly incurred in relation to the trust, otherwise a decree for the conveyance will only be made on payment of the costs of the suit to the trustee.

Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterward executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective descriptions, the conveyance to A. comprised B's land and did not comprise A's own, nor did the conveyance to B. comprise A's land, but each took and kept possession of the land actually intended for him: *Held—Spragge, V. C. dissentiente*—that to a bill afterwards filed by B. against A. for a conveyance of B's land to him, the heir of the original vendor, in whom the legal estate in A's land was still vested, was a necessary party.

The bill in this case, as amended, was filed on the Statement. 15th of November, 1850, by Henry Rowsell, Edward Winstanley, Orlando Salathiel Winstanley, and Elizabeth Winstanley, the executors and executrix of the late Reverend Charles Winstanley, against William Hayden and William John Hayden, seeking to compel them to convey to the plaintiffs, as such executors and executrix, six acres of land in the city of Toronto, under the circumstances set forth in the judgment of the court.

On the cause coming on for hearing—

Mr. Vankoughnet, Q. C., and Mr. R. Cooper, appeared for the plaintiffs. Argument.

1851. Dr. Connor, Q. C., and Mr. McDonald, for the
Howsell
v.
Hayden. defendants.

On the point of parties, the plaintiffs contended that as all interests in the lands in question was out of Mrs. *Elmsley* (the original vendor) before her death, her heir-at-law could not properly be considered a necessary party.

It was submitted that the defendant *William Hayden*, by receiving a conveyance of the land intended for the testator, became a trustee for his benefit, and was therefore bound to convey to those claiming under him.

Argument. The bill cannot be dismissed, because the defendants by their answer submit to execute a deed if plaintiffs would consent to pay the costs; now, the suit having been rendered necessary by the contumacious conduct of the defendants, the court will not order the plaintiffs to pay costs. *Lewin* on trusts, 205-6 and cases there cited; *Cook v. Fountain* (a), 2 *Spence's Equity Jur.*, p. 193, et seq. were referred to.

For the defendants, it was contended that no decree could be made in the absence of Mrs. *Elmsley's* representative, and that if the defendants were bound to execute any conveyance, it could only be a release; this the plaintiffs had not tendered for execution, but a deed containing covenants; now, clearly the plaintiffs were bound to demand nothing more than the defendants were in law bound to execute. Under any circumstances the plaintiffs must pay the costs of the suit.

October 17. THE CHANCELLOR.—The facts of this case, so far at least as they were brought into discussion upon the argument, are sufficiently plain.

Judgment. *Mary Elmsley* was formerly seized in fee simple

(a) 3 Swans, 385.

of three parcels of land, lying adjacent to each other and fronting on Yonge street in the city of Toronto. These premises were of a uniform rectangular shape, each having a frontage on Yonge street of three chains and two links, and being of the depth of twenty chains; they were all composed of parts of lots numbers seven and eight in the first concession from the Bay in the township of York, and for convenience may be designated A. B. C. The south-west angle of C.—the most southerly of the three parcels, is distant eighty-nine chains and seventy-four links, or thereabouts, from the south-west angle of lot Lot No. 8. The south-west angle of B., the adjoining parcel, is consequently about ninety-two chains and seventy-six links from the same point, and the distance from thence to the south-west angle of A. is about ninety-five chains and seventy-eight links.

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Hayden.

In the month of May 1829, *Mary Elmsley*, being then owner in fee of all those parcels, sold and conveyed C., the southernmost, to one *Brown*; that deed was duly registered, and the title to that parcel is not now in question.

Judgment.

Prior to the sale of parcel C., in the year of 1826, as it would appear, *John Hayden*, under whom the plaintiffs claim, had contracted with *Mary Elmsley* for the purchase of lots A. and B., which constituted at that time, it would seem, an undivided tract of twelve acres, for the sum of 150*l.*, and in the year 1828, while in possession under his contract, and before he had obtained his conveyance, *John Hayden* assigned all his interest in the north half, A., to *William Hayden*, one of the defendants in this suit.

The contracts executed by the parties upon these occasions, have not been proved; but it appears that *John* and *William Hayden*, upon the execution of the sub-contract, defined the part belonging to each

1851. by a line which was intended to divide the twelve
acres as nearly as possible, into two equal parts, A.
and B.; and in the summer of 1829, or previously,
a fence was erected in pursuance of that partition,
which has remained unchanged to the present day;
and from that time *William Hayden* has been in pos-
session of A., and *John Hayden*, and those claiming
under him, of B.

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v.
Hayden.

On the 19th of October, 1829, *Mary Elmsley* exe-
cuted two several deeds of bargain and sale for the
purpose of conveying to *John* and *William Hayden*
the parcels to which they were respectively entitled,
and of which they were then respectively in posses-
sion.

Those deeds describe the property to be conveyed
by metes and bounds only. The description in that
to *John Hayden* is in these words:—"commencing
at a post planted on the east side of Yonge street, in
the western limit of the said lot No. 8, and distant
from the south-west angle of the said lot on a course
north sixteen degrees west, eighty-nine chains sev-
enty-four links, thence north, &c."

Judgment.

The description in *William Hayden's* deed is in
the same words, except that it describes the monu-
ment as being ninety-two chains and seventy-six
links distant from the south-west angle of lot No. 8.

Both descriptions are therefore erroneous, to this
extent, that each misstates the accurate position of
the monuments from which the metes and bounds are
traced. *John Hayden's* deed describes the monument
to be eighty-nine chains and seventy-four links dis-
tant from the south-west corner of lot No. 8, while
the actual distance is ninety-two chains and seventy-
six links; and the deed to *William Hayden* states
the post from which his parcel is described, to be
ninety-two chains and seventy-six links from the

south-west angle of lot No. 8, instead of ninety-five chains seventy-eight links, the actual distance.

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The deed to the defendant was registered.

The error in these descriptions was not discovered until the year 1848, when the present plaintiffs, who claim parcel B., through *John Hayden*, having detected the misdescription, brought it under the notice of the defendant, through their solicitor, Mr. *Allan*.

I shall have to consider hereafter more minutely some of the circumstances connected with this application. It is sufficient to remark at present, that Mr. *Allan* proposed to remedy the defects supposed to exist in those titles; in this way he offered, on the part of the plaintiff, to procure parcel A. to be conveyed to *William Hayden* by *A. G. Macaulay*, in whom the legal estate in that portion had vested, he said, under the will of *Mary Elmsley*, and he proposed that *William Hayden* should convey parcel B. to the plaintiffs, by deed of bargain and sale in the ordinary form. Judgment.

This proposition *William Hayden* neither accepted nor refused, but subsequently, and without any further communication with him, the plaintiff prepared a deed of bargain and sale from the Hon. *J. S. Macaulay* and *A. G. Macaulay*, his wife, to *William Hayden* of parcel A. Having procured this deed to be executed by the grantors—who were then and are still resident in England, the plaintiffs prepared a deed of bargain and sale which purported to convey from *William Hayden* to the plaintiffs parcel B., with ordinary covenants for title; and in the month of April 1849, or thereabouts, they offer to hand over the former to *William Hayden*, provided he would execute the latter.

I shall advert again to the several interviews which

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Hayden.

took place upon this subject. For my present purpose it is sufficient to remark, that, the deed in question not having been executed, this bill was filed in December 1849, by the devisees under the will of the Rev. C. Winstanley, claiming through *John Hayden* against *William Hayden* and his son. The prayer is in the alternative, that the defendants be decreed to convey estate B. to the plaintiffs, free from all incumbrances, by deed, record, judgment, or otherwise; or that they be ordered to convey estate B. upon receiving a good title to estate A., and that it be referred to the Master to enquire whether a good title to that estate can be made, and whether such title were tendered by the plaintiffs to the defendants before this suit was instituted, and when, and that in either event, the defendant *William Hayden* be ordered to pay the costs.

Judgment.

The question of costs would seem to be the real issue between these parties. After the bill had been placed upon the file, and before any expense had been incurred by the defendant *William Hayden*, he offered to do all that the plaintiffs required. This offer the plaintiffs refused unless the defendant would also pay the costs of the suit, and the litigation has been continued, not for the adjustment of the rights of the parties, and to obtain the relief sought by the bill, but for the purpose of having the question of costs determined.

Had our opinion upon the evidence been different several legal questions of more or less difficulty, some of which were not discussed, must have been considered before arriving at a conclusion adverse to the defendants. Have the deeds to *John Hayden* and *William Hayden* failed to convey to those parties, as was assumed, the estates to which they were respectively entitled? The property in each case had been ascertained, and monuments had been placed. The

description commences, not from an imaginary point so many chains distant from the south-west angle of lot 8, but from a post planted, so the deed states, and so I assume the fact to have been. Now, had the description been in this form, commencing at a post planted without further designation, it cannot be doubted, I presume, that parol evidence would have been admissible to ascertain the monument, to apply the deed to its subject matter. Then, if that be so, may not the further description in those deeds which states the distance of the posts so placed from the south-west angle of lot 8, be rejected upon the principle "*falsa demonstratio non nocet cum de corpore constat*?" (a). Is not parol evidence admissible to ascertain the monument actually intended by the parties; and may not that portion of the deed which professes to ascertain the distance of the monument actually erected from a known point, be rejected as a false demonstration?

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Hayden.

Judgment.

But assuming the description in the conveyance to William Hayden to be erroneous in the way and to the extent contended for, does it therefore follow that the covenants in that deed are incapable of being made available for his protection? (b) Was not that deed, at all events, executed for his own benefit; and if, by mistake, erroneous, has he not a clear equity to have this error in that very deed corrected? Must he not be entitled to retain this deed as the indispensable foundation of such a suits. Have the plaintiffs any right to the benefit of the covenants entered into by Mary Elmsley for the benefit of the defendant, and upon a valuable consideration paid by him? Is the defendant a trustee of those covenants for the plaintiffs? If, through mistake, the deed to John

(a) Doe v. Bart, 7 T. R. 701; Doe Templeman v. Martin, 4 B. & Ad. 785; Doe Smith v. Galloway, 5 B. & Ad. 51; Hutchins v. Scott, 2 M. & W. 809; Doe Hiscocks v. Hiscocks, 5 M. & W. 363.
(b) Hutchins v. Scott, *supra*.

1851. *Hayden* be erroneous, the plaintiffs have a right, unquestionably, to file a bill against the representative of *Mary Elmsley*, for the purpose of having that mistake corrected. And, if the deed to *William Hayden* be erroneous, and if the legal estate in parcel B. have in consequence vested in him, he may be a necessary party in such a suit. But, in that case, the mistake in both deeds would be corrected, which is something different from the relief here sought.

Judgment.

But, assuming the defendant to be a trustee for the plaintiffs, in the way contended for, it is clear, I think, that this court would not decree that he should convey estate B. without receiving his title to estate A. Suppose *Mary Elmsley* had discovered the error in *William Hayden's* deed, and had filed a bill, would not the decree have directed the correction of such mistake; or, if a conveyance from *William Hayden* had been directed, would that have been ordered without securing to *William Hayden* also a conveyance from *Mary Elmsley*? If the deed from *Mary Elmsley* to *William Hayden* be erroneous, and if the court is asked to interfere because that deed has failed, in consequence of mistake to carry out the intentions of the parties, does not equity require that the court in interfering should place both parties in the same position, so far as that can be done, as if the deed had been drawn correctly? Would it not be a strange equity—a strange mode of correcting mistakes—to abrogate the actual contract, and to ascertain and give effect to the real intent of the parties in favor of one, without securing the same benefit to the other—to compel one party specifically to perform the real agreement, leaving the other free?

Then, if that would have been the clear equity between *Mary Elmsley* and *William Hayden*, can those who claim under *Mary Elmsley* be in any better position? The first step to be established by the

plaintiffs is, that there is a mistake in the deed from *Mary Elmsley* to *John Hayden*. Should not that question be discussed in the presence of *Mary Elmsley* or her representative? The next step is, that the deed from *Mary Elmsley* to *William Hayden* is erroneous, and the conclusion drawn from these premises is, that this court should give effect to the real intent of the parties in favor of the plaintiffs claiming through *Mary Elmsley*, without securing to the defendant a similar benefit—without having before the court the representative of *Mary Elmsley*, and without the means of enforcing specific performance of the whole agreement. Had the representative of *Mary Elmsley* been a party, the court would have had the means of doing complete justice. I am unable to perceive how that end can be accomplished, as the record is at present constituted (a).

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Hayden.

This is perhaps all that in strictness ought to be said now, but as the cause has been brought to a hearing, at great expense, for the sole purpose of having the rights of the parties in relation to the costs ascertained, it may be useful to state our views upon that subject.

Judgment.

Had our opinion upon the questions of law been different—assuming the view taken by the learned counsel for the plaintiffs to be correct—we think, notwithstanding, that the costs must have been borne by the plaintiffs.

The position of *William Hayden* in 1848 was certainly, one of considerable embarrassment. Having paid his purchase money, and continued in possession for a period of nineteen years, he is informed for the first time that he has not a legal title to his estate, and is required to convey to another the estate

(a) *Greenwood v. Atkinson*, 5 Sim. 419; *Lesquire v. Lesquires*, Rep. T. Finch, 134; *Green v. Poole*, 5 B. P. C. 504.

1851. which had passed under a deed executed for his exclusive benefit. Still, if a trustee for the plaintiff as to estate B, it would have been his duty to have disposed of that estate, according to the directions of his *cestui que trust*. He could not have justified refusal. But regarding him as a mere trustee, it would have been no less plainly the duty of the plaintiffs—his *cestuis que trust*—to have solved all reasonable doubts which he might have suggested as to the course he was required to pursue, and they must have discharged all costs, charges and expenses properly incurred in relation to the trust (a). Did the plaintiffs fulfil their duty in that respect?

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Judgment.] In the first place, the deed presented to the defendant for his execution, was not such an instrument as a trustee could have been called upon to execute. As a trustee, he could only have been required to covenant against his own incumbrances (b). Whether even that covenant would have been reasonable, under the circumstances of this case, may well be doubted. But, clearly no further covenant should have been inserted. The deed tendered, however, contains all the ordinary covenants for title.

It is said, however, that the conveyance was not objected to. I am not satisfied of that. It may not have been objected to in terms; is it equally certain that it was not in substance? Is it clear that the defendant felt his position to be one of great difficulty; and it is equally clear, I think, that the manner in which the plaintiffs proceeded to carry out their views must have greatly increased in embarrassment. A mere release of any interest he might be supposed to have had in estate B, would have been something very different from the actual proposal.

(a) Hampshire v. Bradley, 2 Col. 34. (b) Cruise's Digest, vol. 4, page 389; Platt on Covenants, 400; Staines v. Morris, 1 V. & B. 8; White v. Foljambe, 11 Ves. 345.

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But, whatever doubt there may be upon that point, it is plain upon the evidence, I think, that the defendant objected to the description in the deed, as an actual, or, at least, a possible departure from the established boundary between A. and B. It is also plain, I think, that he questioned the title of the *Macaulays*, and that those objections were not cleared up by the plaintiffs.

Upon the latter point, Mr. *Allan's* testimony is conclusive. "He says his brother *John Hayden*, who was present, advised him not to do it (that is, execute the deed,) and the defendant said, how did he know that the *Macaulays* could give him a good title. I explained to him what the *Macaulays'* title was. He still objected, saying he might be giving away a good title without getting anything in return."

With respect to the question of boundary, it is said that the plaintiffs did not mean to insist upon the description in the deed. That may have been so; but their conduct was such, I think, as to warrant the belief that they did mean to insist upon that point. That some difficulty was felt about the boundaries, is plain. Mr. *Allan* says in his first deposition, "he never said positively that he would not, or gave any particular reasons why he would not, but talked at times of the fences and boundaries." Further on he says, "the defendant did not make any objection to giving a deed on the score of the boundaries of the lot, he spoke of the fences and boundaries, but did not, as I understood, give that as the reason for not signing the deed." Now, although Mr. *Allan* did not understand the defendant to object to the execution of the deed on account of the description, it is quite obvious, I think, that he felt a difficulty upon the subject.

Again: in describing the interview between the solicitor of the defendants and himself, Mr. *Allan*

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says, "I did not admit that the description in the draft of the deed covered any land included within the fences, but said that I would get it examined by a surveyor." Now, had the plaintiffs been prepared to yield the point, what could have been their object in having the matter examined by a surveyor. The description might have been predicated upon the existing boundaries. Yet, no less than four surveys have been made by these parties—two by the plaintiffs, subsequent to the interview between the solicitors.

Lastly: In his answer to the amended bill, the defendant says, "that upon one of the said occasions, but upon which this defendant cannot remember, the defendant asked the said *Allan* whether it would not be better to have the said premises surveyed and ascertain the exact position thereof, and that the said *Allan* replied thereto, that they would follow the descriptions in the registered deeds."

Judgment.

Whatever may have been the intention of the parties then, it cannot be doubted, I think, that the defendant understood them to insist upon the description in the original deeds; and their conduct was, in my opinion, sufficient to justify that impression. Now, independent altogether of the possessory title which *William Hayden* is said to have acquired, it is quite plain that the plaintiffs, who claim under *John Hayden*, cannot dispute the boundary between A. and B., which was established by *John* and *William Hayden* before the plaintiffs purchased. They cannot claim that which *John Hayden* had sold to *William Hayden* in 1828. As against the plaintiffs, the defendant had a clear title to everything within his fences; and he had a right, I think, to insist that the premises should be described according to the existing boundaries.

Upon the whole, had the law been with the plaintiffs—upon their own hypothesis—they could only

have been relieved upon payment of costs. I do not mean to say that the backwardness of the defendant would have been justifiable, had he been a mere trustee. But he was not a mere trustee. He had important personal interests to secure. His position was one of great difficulty. Neither do I mean to question the forbearance and fair intentions of the plaintiffs; but, in a case of this sort, the strict rights of the parties must be considered. The litigation originated with the plaintiffs. Had they done all which it was their duty to have done before they filed this bill? I am satisfied they had not. The deed tendered to the defendant was, in many respects, improper. The difficulties respecting the boundaries and the title should have been cleared up, and at the expense of the plaintiffs (a). No distinct proposition of that sort was made. Those questions were still in controversy at the time the bill was filed—several surveys were made after that period.

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Judgment.

The question of boundary should never have been raised. The plaintiffs had no right to require the defendant to determine, at his peril, the accuracy of the description in the original deed. They should not have required him to decide between the conflicting surveys. Had a survey been necessary, the expense of it should have been borne by the plaintiffs. That was not proposed, I think. But, the difficulty could and ought to have been avoided, by describing the premises according to existing boundaries.

Upon these grounds, I think that the costs must have been borne by the plaintiffs, though they had been right in point of law.

Upon the record as constituted, no decree can be pronounced.

If the plaintiffs are advised that their case can be

(a) Poole v. Pass, 1 Beav. 600.

1851. made perfect by amendment or otherwise, they are at liberty to apply, and the case may stand over for that purpose. But, as the question of costs has been set at rest, and the rights of the parties have been defined, it is to be hoped that this matter may be adjusted without further litigation.

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ESTEN, V. C. concurred.

Judgment. SPRAGGE, V. C.—I concur in the conclusion arrived at by the other members of the court, that the costs of this suit must be borne by the plaintiffs. I think this must be the result from the conduct of the parties, even if the plaintiffs were entitled to some conveyance from *William Hayden*, and that without procuring from the heir or devisee of *Mary Elmsley* a deed of the northerly block of six acres occupied by him, and if no other parties than those before the court are necessary parties.

I concede to those acting on behalf of the plaintiffs in the negotiation with *William Hayden*, which preceded the filing of the bill, every disposition to deal with him fairly and justly, at the same time it behoved them to be careful not to demand from him more than they were entitled to, and fully to carry out on their part all that they engaged on their part to do. Failing in either of these points, they were not in a position to file their bill. In my view of what passed between the parties before bill filed, the plaintiffs were wrong upon both these points. They were wrong in requiring from the defendant *William Hayden* the execution of such a deed as they did require him to execute. Supposing him to have been bound to execute some conveyance, he certainly was not bound to execute such a conveyance as they tendered for his execution; this has been pointed out in the judgment delivered by his Lordship the Chancellor.

Again: The plaintiffs, by their agent Mr. *Allan*, engaged to procure a deed to *William Hayden* of the northerly block on which he lived. Upon this point Mr. *Allan* says, after explaining to him the error in the descriptions of the middle and northerly blocks, "I proposed to him that a deed should be got out from England at the expense of the *Winstanleys*, and without any charge to him, conveying to him the property on which he lived, and that he should make a deed to the *Winstanleys* of the centre block." Accordingly, Mr. *Allan* prepared a deed and memorial from *John Simcoe Macaulay* and *Ann* his wife, to *William Hayden*, of the block on which he lived, sent them to England for execution, and upon receiving them executed from England, took them to *William Hayden*, together with a draft of a deed of the centre block, from *William Hayden* to the plaintiff. On this occasion, Mr. *Allan* was accompanied by Mr. *Israel Winstanley*. *William Hayden* had made no promise that he would execute a deed to the plaintiffs, nor had he acceded to Mr. *Allan's* proposition. Upon this last visit of Mr. *Allan* to *William Hayden*, the latter still hesitated about executing a deed, and suggested such difficulties and doubts as occurred to him. He said, how did he know that the *Macaulays* could give him a good title? and upon Mr. *Allan* explaining what the *Macaulays'* title was, he still objected, saying he might be giving away a good title without getting anything in return. His brother advised him not to sign the deed. He refused, though pressed by Mr. *Allan* to say whether or not he would sign the deed, or what he would do; but upon Mr. *Allan's* suggesting to him to take legal advice as to the title of the *Macaulays*, he said that Mr. *Elmsley* would know whether or not the *Macaulays* had a good title, and, as Mr. *Winstanley* says, he expressed some wish to see Mr. *Elmsley* upon the matter. Mr. *Elmsley* was then absent from the Province, and Mr. *Hayden* was told

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Judgment.

1851. by Mr. *Allan* and Mr. *Winstanley* that if they did
not hear from him in a week after Mr. *Elmsley's*
return, a bill in Chancery would be filed.

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Some time after Mr. *Elmsley's* return, he went, accompanied by Mr. *Winstanley*, to see *William Hayden* on the subject of the proposed deed. What passed upon that occasion, is, I think, upon the question of costs, very important.

Judgment.

Mr. *Winstanley* says, "Mr. *Elmsley* told *William Hayden* that they had brought up the deed in order to his executing of the one to Mr. *Winstanley's* devisees. Mr. *Elmsley* then looked over the deeds and expressed a doubt whether the one from the *Macaulays* to *Hayden* was so authenticated as to enable *Hayden* to register it in Canada. Mr. *Winstanley* pressed *Hayden* to execute the deed from himself, which he refused, and Mr. *Winstanley* then threatened him with proceedings in Chancery. Before Mr. *Elmsley* questioned whether the deed from the *Macaulays* was so executed that it could be registered in Canada, *Hayden* had not said whether or not he would execute the deed from himself. After Mr. *Elmsley* had raised the doubt, *Hayden* refused to execute the deed, and, as appeared to Mr. *Winstanley*, by reason of Mr. *Elmsley's* remarks. Mr. *Elmsley* did not press *Hayden* to execute the deed after expressing his doubt as to the *Macaulays'* deed being in a fit state for registry. Soon after this interview the bill was filed—without, so far as appears, any further communication with *Hayden*, or any attempt to shew that Mr. *Elmsley* was mistaken in his objection. I think indeed, it may be inferred from what passed at the hearing, that his objection was well founded, for the plaintiffs urged that they were not bound to register the deed. Now, having started in their negotiations with *Hayden* with a proposal on their part to procure a deed from the repre-

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representatives of *Mary Elmsley*, free of all expense to *Hayden*, having accordingly sent a deed and memorial to England to be executed by the *Macaulays*; having taken them when executed to *Hayden*, as the deed and memorial which they were to procure, and on *Hayden's* desiring to apply to Mr. *Elmsley* on his return to Toronto, awaiting his return, and then having got Mr. *Elmsley* to accompany Mr. *Winstanley* to *Hayden*, they should have shewn *Hayden* that they had done that which all along they had professed their readiness and intention to do. At the interview at which Mr. *Elmsley* was present, *Hayden* certainly had no reason to think that this had been done—but the contrary; he had reason to expect a deed and memorial so executed, that the deed could be registered here. Anything said by Mr. *Elmsley* on the subject would be sure to have great weight Judgment with him.

After Mr. *Elmsley's* remarks, *Hayden* no doubt believed, and for all that appears was right in believing, that a deed defectively executed was offered to him, instead of one duly executed, as he had a right to expect. Mr. *Winstanley* pressing him to execute the deed from himself, after Mr. *Elmsley* had remarked upon the defective execution, and Mr. *Elmsley* not pressing him, were circumstances calculated to induce *Hayden* to refuse to execute a deed.

What then was the position of the plaintiffs when they filed their bill? Had they fulfilled the spirit of their engagement to *Hayden*, or did they file their bill against him because he did not give a deed when they had themselves failed in the performance of a preliminary act, proposed by themselves?

I think they were bound in the spirit of their engagement to procure a deed in a fit state for registry, and even to be at the expense of registration, before they could ask *Hayden* for a deed. They per-

1851. formed their engagement partially only, and yet insisted upon a deed, and filed their bill because he refused. There was a condition precedent, which it lay with them to perform. They brought their suit without performing the condition precedent.

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v.
Hayden.

I think that such would have been the position of the plaintiffs, even if *Hayden* had engaged to execute the deed they had prepared, or, if they had prepared an unexceptionable instrument for his signature; but the reverse of this is the fact, and the plaintiffs stand therefore, in respect of each of these points, in a worse position than if the facts had been otherwise.

Taking the circumstances also, of any title in *William Hayden* having at the time the bill was filed become actually extinguished in the land, in question, there was the less reason for filing the bill.

Judgment.

From the evidence of Mr. *Allan* and Mr. *Winstanley*, I suppose that they looked upon *Hayden* as an impracticable sort of person, who would enter into no engagement—who would not say what he would do, or whether he would do anything. I think, under the circumstances, great hesitation and caution were quite natural on his part. An uneasy apprehension that he might commit himself, or compromise his interests—a slowness to take any step, or engage to take any step that might have such effect—were no more than might have been expected in a man in his position. The dishonest advice given by his brother that he should “hold on to both lots,” cannot be too strongly reprehended; but he did not listen to this bad advice, for even Mr. *Allan*, irritated as he was at what he considered *Hayden's* obtuseness, and the interference of his brother, made the remark, that he believed *Hayden* wished to do what was right, but had not head enough to understand it. It no doubt appeared clear to Mr. *Allan* that *Hayden* ought to

take a certain course, but it was by no means clear to Mr. *Hayden* that he could safely take that course. Doubts and difficulties, and those by no means fanciful ones, arose in his mind. Time and consideration—an interview with a gentleman in whose judgment and advice he confided—were not unreasonable demands; and a refusal to promise anything, or say what he would do, were not, as I conceive, proofs of anything but caution.

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I cannot say that the evidence has by any means produced upon my mind the impression that *Hayden's* conduct was such as necessarily to lead the plaintiffs to think that no course was open to them but to file a bill, and I think that even if they were free from the several difficulties which have been referred to, their bill was filed prematurely.

There are some views contained in the judgment of his Lordship the Chancellor, in which I am not prepared to concur: The necessity for the representatives of *Mary Elmsley* being parties to the suit, and the obligation of the plaintiffs to procure a deed to *William Hayden* of the northerly block, the one occupied by him, apart from their engagement so to do. This is of course assuming the plaintiffs not to be bound to rest content with the title acquired by possession, of themselves and those under whom they claim.

Suppose no land had been purchased by *William Hayden*, and that none was intended to be conveyed to him, but by a mistake a conveyance of the land in question had been made to him by *Mary Elmsley*, I apprehend that those beneficially entitled would have an equity to compel a conveyance from him. Assuming that he would be entitled to have it sufficiently proved that those claiming were entitled, he would be bound, I conceive, to convey to those who should so prove themselves entitled.

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Hayden.

Judgment.

The case supposed differs from this, in that *William Hayden* is himself beneficially interested in certain lands purchased by him of *Mary Elmsley*, which land, according to its correct description, was never conveyed to him by *Mary Elmsley*, but the description in his deed is, or appears to be, of other land, and in which other persons are beneficially interested. The question then arises, whether, assuming him bound to divest himself in favor of those beneficially interested of his legal estate, or apparent legal estate in lands described by mistake in the deed to himself, he can make it a condition precedent, that those beneficially interested in such lands shall first procure a conveyance to be executed to him of *other* lands—that is, of the lands he really purchased of *Mary Elmsley*; such conveyance to be executed by whomsoever may be the heir or devisee of *Mary Elmsley* of lands, as to which the party procuring the execution of such conveyance is and always has been a stranger. In other words, being a trustee in respect of certain lands for those beneficially interested, can he refuse to convey to them, unless they procure from others who are trustees for *other* land in which *he* is beneficially interested, a conveyance to him thereof? Upon what principle can he disappoint others of an equity to which they are entitled, because he has a similar equity against *others* in respect of *other* land? How is it that their equity against him in respect to one property, is dependent upon his equity against others in respect to other property.

If it be so dependent, it must be because such property was purchased from the same individual. That individual contracted to sell to each a separate property, and executed a conveyance to each; in the conveyance to *John Hayden* describing property previously conveyed to one *Brewer*, and in the conveyance to *William Hayden* describing the property

contracted to be sold to *John Hayden*—the property 1851.
 contracted to be sold to *William Hayden* not being
 described in any deed.

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Hayden.

Now, supposing the rights of the parties to be—that of *William Hayden*, under his contract of purchase to have a deed from *Mary Elmsley* or her representatives, correctly describing the property he contracted to purchase from her—and that of *John Hayden*, or those claiming under him, to have under his contract of purchase, a deed from the same parties, correctly describing the property contracted to be purchased by him, the right of each being thus founded on a contract with *Mary Elmsley*—each of them could of course enforce his equity against *Mary Elmsley* independently of the other of them. But *John Hayden* (or those claiming under him) has an equity also against *William Hayden*, while *William Hayden* has no corresponding equity against him. How is *John Hayden's* equity against *William* dependent upon *John's* enforcing *William's* equity against *Mary Elmsley*. It cannot, as I conceive, be founded upon the circumstance of *John's* having, in addition to his equity against *William*, an equity also against *Mary Elmsley* upon her contract. He may not be able, indeed, to enforce the latter, or to enforce *William's* equity against her, and it would not, as it appears to me, be reasonable, that *William* should refuse to do equity to *John* until *John* enforces his *William's*) equity against the representatives of *Mary Elmsley*—an equity which it might be out of his power ever to enforce.

Judgment.

Again: With the error in the deed to *William Hayden* *John Hayden* had nothing to do; the mistake was not his, but that of *Mary Elmsley* and of *William Hayden* also; nor is there any privity between them—each purchased a separate property; and, assuming *William Hayden's* right to claim a corrected deed

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from *Mary Elmsley*, it does not follow that he can require *John Hayden* to enforce it for him as claiming under the same person, for he does not, as I conceive, claim under the same person in the proper meaning of that term, for the two do not claim under her in respect of the same land—they only happen to derive their titles to their respective properties from the same individual.

Judgment.

If indeed, *William Hayden's* divesting himself of his legal estate, or apparent legal estate, would necessarily affect his rights injuriously as against the representatives of *Mary Elmsley*, there would then appear to be more reason than there otherwise would be for requiring those claiming under *John Hayden* to procure a corrected deed to *William Hayden*. Such a deed as the plaintiffs required *William Hayden* to execute would probably affect his rights against *Mary Elmsley's* representatives; but I apprehend that an instrument properly framed, would satisfy *John Hayden's* equity against him, without prejudicing his rights against the representatives of *Mary Elmsley*, and he would, I conceive, be entitled to retain the deed which he now holds.

I have assumed that those claiming under *John Hayden* have an equity against *William Hayden* which they can enforce—either upon enforcing, or without enforcing *William Hayden's* equity against the representatives of *Mary Elmsley*. I think his position is that of a trustee, for those claiming under *John Hayden*. Mr. Hill in his treatise on trustees has this passage: "Wherever the circumstances of a transaction are such, that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner so as to convert him

into a trustee, for the parties who in equity are entitled to the beneficial enjoyment." 1851.

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Hayden.

This passage is cited with approbation by Mr. *Spence* in his treatise on equity jurisprudence, and enunciates a principle, applicable, as it seems to me, to the relative position of the parties to this suit. The equity of the plaintiffs is, as I conceive, wholly unconnected with the circumstances of their deriving title to their property from the same person as *William Hayden* derives title to his, but rests upon this—that the legal estate, or apparent legal estate in property to which the plaintiffs are beneficially entitled, is *however derived in William Hayden*, and by reason of its being so, he is a trustee for the plaintiffs.

As to the representatives of *Mary Elmsley* being necessary parties to this suit in order to *William Hayden* having his rights over against them, that principle can only apply where the rights over are in respect of the same subject matter. Here they are, as appears to me, of a different subject matter. Judgment.

Upon the two points to which I have adverted, I have the misfortune to differ from the views of the rest of the court, and I cannot therefore help distrusting the correctness of my own. I have thought it right to state shortly the difficulties which I have felt in the way of my concurring with them.

Still I think, for the reasons which I have given, that when the plaintiffs commenced this suit they were not in a position in which they could properly file their bill, and for that reason the costs of the suit ought, I think, to be borne by them.

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COTTLE V. CUMMINGS.

Practice—Production of pleadings.

October 29. Where it is required to produce any of the original pleadings filed in this court before any other court, the party desiring their production must obtain an order of this court for that purpose.

Statement. The Registrar of this court had been served with a subpoena *duces tecum*, requiring him to produce the bill and answer filed in this cause before the grand jury and court of Oyer and Terminer then sitting at Woodstock, upon a charge for perjury preferred against the defendant, said to have been committed by him in his answer in this cause. With this subpoena the registrar was unable to comply and now

Argument. Mr. *Crickmore*, for the plaintiff, upon an affidavit shewing that such charge was about to be preferred against *Cummings*, and that it was necessary that the pleadings mentioned should be produced before the grand jury and at the trial of the indictment—moved for an order directing the Registrar to attend with them; citing as authority for the application *Stratford v. Greene* (a): but,

Judgment. *Per Curiam*, no case has been cited to shew that the Registrar is bound to attend upon a subpoena under the circumstances. And, assuming him to be bound to attend, he would not be authorised to withdraw from the files the papers required without the direction of the court, which will only be given upon a proper case being made by affidavit. The court takes care that no difficulty is thrown in the way of prosecutions of this sort; they are essential to the ends of justice. But it would be attended with the utmost inconvenience if the Registrar of the court were required to attend upon such occasions. We cannot direct that. We think, however, that the object of the plaintiff will be attained by directing

(a) 1 Ball & B. 294.

an order to be drawn up authorising the Registrar to transmit the pleadings to one of the masters extraordinary resident at Woodstock, with instructions for him to produce them before the grand jury and on the trial of the indictment, and afterwards to be returned to the Registrar of this court (a).

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Cottle
v.
Cummings.

FREELAND V. JONES.

Practice—Infants.

On a motion for the appointment of a guardian *ad litem*, under the 21st order of May 1850, the court—*Esten, V. C. dubitante*—permitted an affidavit, shewing that the defendants were infants, to be filed after the day named for the motion to be heard. October 31.

On a former day a motion had been made for the appointment of one of the solicitors of this court as guardian *ad litem*, under the 21st order of May 1850. No person attended on behalf of the infants; but as it appeared that no affidavit shewing that the defendants were infants had been filed, the court declined to make the order. On a subsequent day, Mr. *Brough*, for the plaintiff, renewed the motion, having since the matter was mentioned filed the requisite affidavit to shew the infancy of the defendants. The motion stood over for consideration and now—

THE CHANCELLOR.—When the motion was made, I was inclined to think that the defect could not be supplied. We have repeatedly refused to receive such affidavits when the relief asked by the motion is adverse. But upon reflection, it seems to me that this motion is of a different character. It is not adverse: it is for the protection of the infants. But for the infancy of the defendants an appearance might have been entered without any motion. This motion is for the protection of the infants; and the object of the affidavit being merely to shew that the defendants Judgment.

(a) See also *Thompson v. Crosthwaite*, 2 Y. & J. 512; *Curtis v. —*, 1 Hogan, 132; *Swift v. Quinlan*, ib. : *Jarvis v. White*, 8 Ves. 313.

1851. require that protection, I think that the affidavit may
 Freeland be now received and the order made.
 v.
 Jones.

ESTEN, V. C.—I am not prepared to go quite the length required in this motion, nor have I been able to satisfy myself that motions of this nature stand on any different footing from others; however, as my brother *Spragge* concurs in the views expressed by his Lordship the Chancellor, the order will be in accordance with those views.

Per Curiam.—Order granted as moved for.

PRENTISS V. BRENNAN RE DAVID PETERSON.

September 5
& October 3.

Where after the appointment of a receiver, or the issuing of a sequestration, a question with persons not parties to the suit arises on an interlocutory application as to the right to property claimed by the receiver or sequestrators, the court may either dispose of the matter at once upon the affidavits filed, or, if the matter is not ripe for decision, the court directs such proceedings to be had as appear on the whole best fitted for the determination of the question of right.

An order referring it to the Master to enquire whether a claimant has any, and what right to property sequestered, is an order which it is quite competent for the court, if it chooses, to make.

But where an order was drawn up in that form without reference to the court, the court on the application of the claimant, directed the order to be modified by adding a direction that the claimant should be examined before the Master.

The effect of a claimant's examination *de interesse suo*, considered.

Argument.

Mr. C. W. Cooper, on behalf of the claimant.

Mr. Mowat, contra.

1. *Smith's* Chancery Practice, 450, 2d Ed.; *Empringham v. Short* (a), *Walker v. Bell* (b), and *Daniels' Chancery Practice*, page 1271, were cited.

The judgment of the court was delivered by—

THE CHANCELLOR.—The receiver in this cause
 October 3. being in possession of certain property claimed by
 Judgment. *David Peterson*, he applied on the 7th day of March last to be examined *pro interesse suo*.

(a) 3 Hare, 470. (b) 2. M. & Ad. 21.

An order bearing that date was subsequently drawn up, by which it was referred to the Master of this court to enquire and state whether the said *David Peterson* had any, and if any, what right, title or interest in the premises in question.

1851.
Prentiss
v.
Brennan.

The present motion, on behalf of *David Peterson*, asks that the order of the 7th of March may be rescinded, and that the claimant may now be permitted to be examined *pro interesse suo*.

Mr. *Cooper* argued that the order of the 7th of March, according to the settled practice, should have directed either a trial at law, or an examination of the claimant *pro interesse suo*. He contended that the order, as drawn up, would prejudice his client, inasmuch as he would be thereby debarred from availing himself of his own testimony—a benefit to which he would be entitled, as was argued, upon an examination *pro interesse suo*. He stated that he had never instructed his agents to consent to any other course than an examination *pro interesse suo*; and that they had in fact, consented to the present order under a mistaken impression as to its effect.

Judgment.

No discussion took place when the matter was originally moved. That arose probably from this circumstance: That a similar question had been then recently before us in this suit, upon the claim of *Elizabeth Brennan*. Upon that occasion the court thought that the question of right would be disposed of most satisfactorily by a jury. At the same time a reference to the Master was suggested, as possessing some advantages, and that course was finally adopted by the election of the parties. Upon the application in this matter, the learned counsel on both sides stated that they were prepared to frame an order by consent, with a view, as the court understood, of avoiding the delay and expense of the ordinary proceedings on examinations *pro interesse*.

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Prentiss
v.
Brennan.

Of the jurisdiction of the court to make such an order as was drawn up, we entertain no doubt.

Upon applications of this sort, the court either disposes of the matter at once, upon the affidavits before it; or, if the matter appears not to be then ripe for decision, the court considers and directs such proceedings as appear, on the whole, best fitted for the determination of the question of right. Mr. *Daniel* states the practice to be so, in express terms (a); and the text is, in our opinion, quite warranted by the authorities.

Judgment. In *Dixon v. Smith*, (b), Lord *Eldon* determined the right in the first instance. It was there argued that the court had not jurisdiction to make an order in favor of such a claim, without subjecting the claimants to an examination *pro interesse suo*. But the learned judge said: "In a clear case, the court will not send parties into the Master's office, merely that they may return with their rights as plain as when they went. The facts are not disputed, and a question of law is more fitly discussed here than before the master."

In *Empringham v. Short*, Sir *James Wigram* says: "It is perfectly clear that the court exercises a discretion;" and again—"The court sees what is necessary to be done in order to try the question of right, and it then puts it in the way of trial.

Russell v. The East Anglican Railway Co. was decided by the Vice-Chancellor *Knight Bruce*, and came subsequently before Lord *Truro*, upon appeal. In disposing of the argument that an order could not properly be made in favor of the application without subjecting the applicants to an examination *pro interesse suo*, the Vice-Chancellor observed (c), "I have

(a) 1 Danl. C. P. 646, 2nd Eng. Ed. (b) 1 Swan, 457. (c) 14 Jurist, 968.

know such cases in my own experience dealt with, I had almost said, in every conceivable manner. Now here, to send the parties into the Master's office with an enquiry *pro interesse suo*, would, I think, be a frivolous waste of time. There appears to be nothing to enquire about which the court is not as competent to decide as the Master would be; and after all, the matter might be brought by way of appeal from the Master to the court. I see much probable evil and no advantage in sending the case in its present state to the Master's office for any purpose whatever." The Vice-Chancellor in that case, decided, in the first instance, *in favor of the claim*. When the matter came before Lord *Truro*, he also decided the question of right, in the first instance—but against the claim. He states the arguments which were addressed to him in these words: "It is said however, on the other side, that even supposing the petitioners to be right, still they ought not to have the relief they ask in the present shape. It is said that they ought to file a bill, *or* *that they should be heard pro interesse suo*;" and, after considering the authorities at some length, and more particularly *Gouch v. Haworth (a)* he proceeds: "The principle of that case—*Gouch v. Haworth*—and the other cases to which I have referred is this, that where the court has granted a receiver, and where a writ of sequestration has issued—and in other cases, where an application can be made which can bring distinctly before the court all the materials which the most lengthened and expensive enquiry can produce—it is the duty of the court at once to pronounce its opinion."

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v.
Brennan.

Judgment

We entertain no doubt, therefore, that it would have been competent for the court to have pronounced, on the 7th of March, the order as it has been drawn up, had such an order seemed upon consideration expedient. But that question was not submitted to us.

(a) 3 Beav. 428.

1851. The order was framed by arrangement between the parties. Had the question been submitted to us, I think I may safely say, that we should not have been disposed to pronounce any order which would have had the effect of depriving the claimant of any advantage in the assertion of his rights, which would have belonged to him in the ordinary course of proceeding. In cases of this sort, out of the ordinary course, it is the duty of the court, we think, to facilitate claimants as far as possible in the assertion of rights, and if the order now objected to do in fact subject the present applicant to any disadvantage—and such seems to us to be the case to some extent—then, the general misunderstanding under which the parties are shewn to have acted is such, we think, as to make it proper that the matter should be now set right.

Judgment. But, while we think that the order should be modified to some extent, we can by no means accede to the general proposition advanced by the learned counsel upon the argument. He assumed, as we understood, that an examination of this sort is ordered for the exclusive benefit of the examinant, and that when taken, it is to be treated as evidence in his favor, until displaced.

The practice upon this point is certainly somewhat obscure; but the propositions laid down have not been sustained by any authority, and are, in my opinion, irreconcilable with principle. This sort of examination should be considered, perhaps, rather as proceeding for the benefit of the plaintiff, to enable him to test the truth of the case advanced, than as a step directed with any view to the establishment of the claimant's title. Mr. *Smith* (a), in speaking of the practice on this subject, says: "It would appear that

(a) 1 *Smith*, C. P. 451, 2nd Ed.

a person interested in property seized, either by sequestration or by a receiver, has two remedies; one is an application to be examined *pro interesse suo*, which is granted unless a clear case is made out by the other party that the claim is delusive. The other course is for restitution of the goods without going before the Master. This last application may be determined on the evidence, but can I think seldom be granted, as, if granted without a reference, the party loses the benefit of examining the claimant, which appears essential to the justice of the case."

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v.
Brennan.

The claimant must be supposed to have stated his case upon the original affidavit, in the way most favorable to his own interests; must not the subsequent examination, upon interrogatories, be regarded from the nature of the thing as a proceeding for the protection of the plaintiff, rather than for the benefit of the claimant? Such certainly would seem to be the understanding of the profession. *Russell v. The East Anglian Railway Co.* was argued on behalf of the plaintiff by Sir *F. Kelly*, Mr. *Bethell* and other eminent counsel. They contended (a) that the Vice Chancellor *Knight Bruce* had decided the case in favor of the claimant, without having had recourse to the only mode in which it could have been so adjudicated properly—namely, by giving the party leave to obtain an order upon notice, to be examined *pro interesse suo*. That is, as I understand the argument, that the learned Vice Chancellor had decided the question of right in favor of the claimant, without having subjected him to the examination upon interrogatories required by the practice for the plaintiff's protection. Mr. *Rolt*, on behalf of the claimants, argued (b), that all the facts being before the court, the question ought to be then decided, and that the

Judgment.

(a) 3 Mack. & Gor. 106. (b) Page 133.

1851. *petitioners ought not to be required to go in before the Master to be examined pro interesse."*

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Brennan.

Again: The general rule certainly is, that an examination is evidence against the examinant, not in his favor; and no authority has been cited, neither has any principle been suggested for giving to this peculiar examination an effect different from that which would belong to an ordinary examination.

Judgment. We have made these observations for the purpose of limiting our assent to the propositions advanced, and not with any view of defining, beforehand, the effect to be given by the Master to the examination when taken. For the purpose of the present application, we assume that such an examination might weigh to some extent for some purpose, and if capable of effect to any extent, for any purpose, then, we think, that the order of March ought, under the circumstances of this case, to be modified so as to secure the applicant from being deprived of any advantage he would have had under the ordinary mode of proceeding.

That it would be competent to the Master to examine these parties under the order as it now stands, seems clear (a). But something further is wanting. To place the claimant in the precise situation he would have occupied, the order ought, it would seem, to direct that he be examined before the Master, and to that extent we are of opinion the motion ought to succeed.

That portion of the application which seeks that the matter should be referred to Mr. *Burrows*, cannot be granted. It is established by the affidavits, we think, that there was an agreement to that effect. Mr. *Cooper* has sworn that it was so arranged, not-

(a). 10th order of January 1851.

only with Mr. *Mowat*, but also with Mr. *Hill*, the plaintiff's solicitor. Mr. *Hill* makes no affidavit, and Mr. *Mowat* only says that it is his impression that the matter was left open. But, assuming the agreement to be established, we have no power to carry it into effect. Whether such a reference would be proper, even with the assent of all parties, may well be doubted. But Mr. *Mowat* refuses to consent, and it is quite clear that we have not power to make an adverse order referring a matter of this sort to any other person than a Master of the court.

1851.

Prentiss
v.
Brennan.

Should the reference then be to the Master here, or at Kingston? The bill has been filed here, and the reference, I apprehend, ought to be *prima facie* to the Master here. No case has been made requiring a different order. Indeed, there would seem no longer any foundation for such an application, the parties having, as I understand, come to an agreement to have the evidence taken before Mr. *Burrows*. The evidence having been disposed of, the convenience of the respective solicitors would seem to be the only remaining consideration, and that clearly would afford no ground for depriving the plaintiff of his *prima facie* right to have the reference directed to the Master here.

Judgment.

The order of the 7th of March must be amended by inserting in it a direction to the Master to examine the claimant, but that must be upon payment of costs inasmuch as the application has been rendered necessary by his own neglect.

Similar orders must be pronounced on the several applications of *Paul C. Peterson*, *Elizabeth Brennan* and *Eliza Brennan*.

1851.

RE BROWNE—A BANKRUPT.

Appropriation of payments—Parol evidence.

September
30 and
October 17.

A creditor who takes a mortgage from his debtor for 2000*l.* (part of a debt of 2414*l.* 18*s.* 11*d.*) and afterwards renders accounts, commencing with the balance of 2414*l.* 18*s.* 11*d.*, and taking no notice of the mortgage for 2000*l.*, and in such accounts credits (without any objection by the debtor) sums received after the mortgage given, but before it fell due: *Held*, that this proved an appropriation of such sums toward payment of the original debt, including that part of it which was secured by mortgage.

In those cases in which parol evidence is admissible to control the legal operation of a deed, no effect can be given to such parol evidence if it is contradictory or its accuracy is involved in doubt.

On the matter being referred back to the commissioner(a), he had retaken the evidence and again found a sum exceeding 1000*l.* still due Messrs. *H. & S. Jones* on the mortgage security; founding his decision mainly on the case of *Henniker v. Wigg* (b). From this decision the second mortgagees again appealed.

Mr. *R. P. Crooks* and Mr. *Turner* for the appellants.

Mr. *A. G. McLean* and Mr. *Strong* for the respondents, contended that as the mortgage was given, not for any ascertained balance, no settlement of accounts having been come to previously to its execution, it must be looked upon as having been given to the Messrs. *Jones* to secure any balance that might be afterwards ascertained to be due from the bankrupt to them on a final adjustment of the accounts between the parties; indeed *Welch* and *Browne*, the agents of the respondents and the bankrupt, both swear that they understood the arrangements to be entered into with that view; and it appears that no subsequent advances were ever made by the respondents to the bankrupt, except upon the production and assignment of warehouse receipts for produce

(a) See ante, p. III. (b) 4 A. & E., N. S. 792.

shipped to them. Now, although the mortgage may ^{1851.} not have been drawn in such a way as expressly to ^{Re Browne.} cover any floating balance, still the effect of that instrument may be controlled by the parol evidence which has been adduced. *Pease v. Hirst* (a) shews that this can be done. They also referred to *Story's Equity Jurisp.* sec. 59 b.; *Smith's Mer. Law*, 539, ^{Argument.} Am. ed.; *Bowyer on Civil Law*, 251-2; *Price v. Moulton* (b).

For the appellants, it was contended that the understanding of *Welch* and *Browne* as to the arrangement, could not have the effect of making an agreement for the creditors, who, it could not be disputed, had a perfect right to apply the payments in any manner they thought proper, and having applied them in the manner shewn, it is clear that even had any agreement to the effect contended for really existed, this subsequent treatment of the matter would have countervailed such agreement; but no such agreement was in fact made, and the accounts rendered to the bankrupt shew what the real intention of the parties was.

The judgment of the court was delivered by—

THE CHANCELLOR.—Upon the hearing of a previous petition of appeal in this bankruptcy, we were ^{October 17.} of opinion, upon the facts then appearing, that the ^{Judgment.} account of the Messrs. *Jones* had been taken upon an erroneous principle; but, as there was not before us evidence sufficient to warrant any final order, the case was referred back, that further evidence might be taken and the whole matter reconsidered.

The conclusion of the learned commissioner upon the evidence adduced on that further reference, is identical with that which he had formerly drawn, namely: That there is still due to the respondents,

(a) 10 B. & C. 122. (b) 15 Jur. 228.

1851. on foot of the mortgage security, the sum of 1987l.
Re Brown. 3s. 6d ; and the present appeal is from that finding.

The general features of the case remains unchanged, and the rights of the respondents are now rested, by counsel, upon arguments similar to those formerly advanced. It is argued, in the first place, that the simple contract debt to the extent of 2000l. had merged in the higher security; that the mortgage debt was not payable until January 1849; and that the Messrs. *Jones*, having therefore no authority or right to apply the accruing payments in discharge of that debt, they must of necessity be applied in discharge of the recent unsecured advances, leaving the whole balance due upon the mortgage. It is said, secondly, that it is established by the evidence, either that this mortgage was given to secure the floating balance, or that the after payments were in fact appropriated to discharge the after advances; and that in either event, the sum reported remains still due upon part of the mortgage.

Judgment.

I have considered attentively the evidence now before us—the elaborate judgment of his Honor—and the numerous authorities cited, and cannot say that I entertain any doubt, either as to the law or facts connected with the case.

But before proceeding to state the grounds of our judgment, I will advert for a moment to the general nature of the question before us, about which some misapprehension appears to me to have arisen. This is not a question between the Messrs. *Jones* and the bankrupt. It is not a question whether the application of the law will contravene the intention of the parties to that contract, and lead to conclusions “palpably unjust,” as has been supposed. Such consequences may, no doubt, at times follow the strict application of any rule of law, no matter how just. So long as our legal rights are determined according to

certain known rules, their strict application must ^{1851.}
 affect injuriously those who neglect their observance. ^{Re Browne.}
 And in such cases it is considered, necessarily and
 wisely considered, that the law must be maintained,
 notwithstanding the hardship of the individual case.
 The law must not be bent and its efficiency impaired
 to avert such consequences.

But that is not the alternative in this case. The
 question here is between innocent purchasers—the
 appellants and respondents—upon one of whom the
 loss must fall. If the elder mortgage has been in
 fact paid off, I know of no principle of justice upon
 which we should desire to keep it on foot to the pre-
 judice of the subsequent incumbrancer. In whatever
 proportion the law is strained, or the facts wrested, in
 favor of either, law and fact are bent, to the same
 extent, in opposition to the just claims of the other. Judgment.

The question before us, then, is simply this: Has
 this mortgage been paid, or has it not? What facts
 are fairly deducible from the evidence? and what is
 the rule of law as applicable to those facts?

Had the question of fact depended upon the evi-
 dence of the bankrupt, our position would probably
 have been one of considerable embarrassment. He
 was examined on three occasions. Of those exami-
 nations, the learned commissioner—who had the ad-
 vantage of being present—has remarked, that the
 second examination “differs materially from his former
 testimony,” and the third “differs materially from that
 given by him on either of the former occasions.”
 The bankrupt’s first examination we have not seen.
 The learned commissioner has expressed his concur-
 rence in the conclusions which we drew from the
 second. Whilst the third examination—after our
 opinion had been pronounced, and after the effect of
 the evidence had been discussed—has been such as

1851. to justify the directly opposite conclusion drawn from it by the learned judge.
Re Browne.

Judgment.

It would have been difficult to have satisfied ourselves that evidence of such a character—discrepant to that extent, and in such material particulars—could have been acted on safely, for any purpose. But there is another, and as it seems to me, most material objection to this testimony, which appears to have escaped observation. The last examination is quite inconsistent with itself. The second examination amounts in effect to this—that the mortgage had been given to secure a specific debt then due, “and for no other consideration;” while the after payments were to be applied to after advances, as the bankrupt understood, although he did not recollect that anything had been said upon the subject. That was consistent with itself—probably true. But the last examination describes this mortgage as given to secure “any balance found due from time to time from the bankrupt,” and yet, with strange inconsistency, re-asserts the agreement to apply recent payments to recent advances. Now these two things appear to me quite incompatible. If the mortgage was given to secure the floating balance, is not that quite inconsistent with the agreement to apply subsequent payments to new advances? Under such an agreement there would be no floating balance to be secured; that would only arise upon the application of the new payments to the old debt.

But, although these agreements would be equally beneficial to the mortgagee in the result, that result would, nevertheless, be attained in ways quite opposite—in the one case, by the application of the new payments to the old debt; in the other case, by taking care that they should not be so applied. No two agreements could well have been more inconsistent. They can hardly have co-existed; yet the bankrupt is assumed by his Honor to have affirmed both.

Without entering into any more minute investigation of the evidence, I think I may say that any conclusion based upon it as to the actual agreement of these parties, would be felt to be highly unsatisfactory. The legitimate conclusion is, perhaps, that no agreement had been entered into upon the subject. But, however that may be, thus much may be, I think, confidently affirmed, that it would be quite unsafe upon such testimony to neutralize or control the effect of the written evidence in the case.

1851.

Re Browns.

It is said, however, that the mode of dealing between these parties is sufficient to corroborate the evidence of the bankrupt, if not to warrant the court in inferring the agreement to which he has deposed. I do not feel the force of either argument. The arrangement that the Messrs. *Jones* would accept the bankrupt's drafts only upon the deposit of, and in proportion to the warehouse receipts, would have been, as it seems to me, a very reasonable arrangement at the very outset of their business connection. Messrs. *Jones* might fairly have said, we will accept your drafts, but only in proportion to the business with which you entrust us, and upon having the immediate control of the property to be consigned. And in the actual circumstances of this case—after the execution of the mortgage—nothing can be more natural than that the Messrs. *Jones* should exact some such terms. They may very reasonably have said to the bankrupt, your transactions of 1847 have resulted in a large balance against you; having now secured that, our future dealings must be upon more equitable terms. But such an arrangement might have been entered into originally, and may in fact have been entered into after the execution of the mortgage, without the slightest reference to the ultimate application of the moneys to be realized. I can discover nothing in it from which any intention as to such ultimate application is to be inferred.

Judgment.

1851. Looking at the written evidence, then, the deed in terms secures a specific sum of 2000*l.* and not the floating balance. Now, without controverting the proposition of the learned commissioner, that parol evidence is admissible for the purpose of converting this mortgage into a continuing security—although I do not mean to assent to it (a)—still, assuming that to be so, it must be admitted, I presume, that, in determining the intention of these parties, their solemn deed upon the subject would be very cogent evidence, under any circumstances. To assume these parties to have had an intention different from that expressed in the deed, upon the parol evidence laid before us, would be in my opinion quite unwarrantable.

Re *Browne*.

Judgment. It is argued however, that the simple contract debt having merged in the higher security, and payment thereof having been postponed until the first of January 1849, the conclusion is inevitable, that the parties must have intended to apply the subsequent payments to the only debt then due—the subsequent advances. We need not now consider the question of merger, because, assuming the law to be as stated (b), it is quite obvious that it was competent to the parties to treat the simple contract debt as still subsisting, and the mortgage as a collateral security only.

It being competent to the parties then, so to deal with this security, it is established, incontrovertibly, I think, by the documents before us, that such was the course actually pursued. In the accounts delivered from time to time by the Messrs. *Jones* to the bankrupt, the debits are entered in this way: The first column states the date when the sum became due—the second, the amount—the third, the number of

(a) *Coote on Mortgages*, 429; 1 *Powell on Mortgages*, 534; 1 *Addison on Contracts*, 354-5. (b) *Price v. Moulton*, 15 *Jurist*, 228. *Norfolk Railway Co. v. McNamara*, 3 *Ex.* 628; *Holmes v. Bell*, 3 *M. & G.* 213.

days for which interest is to be calculated—and the 1851.
fourth, the amount of interest. In the account delivered on the 30th of April 1848, the first item on the debit side is the balance of 241*l.* 18*s.* 11*d.*; it is stated to have become due on the 31st of August 1847, and 96*l.* 9*s.* 4*d.* is charged as interest upon that sum for 243 days. At the foot of that account there is this entry :

"Balance in favor of *H. Jones & Co.* as cash, 30th April 1848, 1808*l.* 17*s.* 2*d.*"

Again : In the account delivered on the 30th June 1848, the first item on the debit side is the balance of the former account, 1808*l.* 17*s.* 2*d.*, due on the 30th of April 1848, upon which the interest is charged at 18*l.* 2*s.* 9*d.* for 61 days; and at the foot of that account there is this entry :

"Balance in favor of *H. Jones & Co.* on transactions of 1847, as cash, 1221*l.* 13*s.* 0*d.*"

Judgment.

Lastly : In the account delivered on the 31st of July, the first item is the balance of the last account debited as due on the 30th of June, and interest is charged thereon for 30 days. At the foot is an entry similar to that extracted from the two preceding accounts. It is quite obvious therefore that these parties dealt with the simple contract debt as still existing and treated the mortgage as only collateral security. It would have been quite absurd otherwise to have entered the different balances as debts then due, and charged compound interest in the way that has been done in these accounts, the mortgage having only provided for the payment of the principal and simple interest on the 1st of January 1849.

But, not only did these parties treat the balance of September 1847 as a still subsisting simple contract debt, but they in fact appropriated the subsequent receipts to its liquidation. The account of the 30th

1851. of April 1848, as I have before shewn, brings down a
Re Browne. balance of 1808*l.* 17*s.* 2*d.* in favor of *H. Jones & Co.*,
Now that account is utterly inconsistent with the
supposed agreement, to apply all receipts subsequent
to the mortgage, in liquidation of the new advances.
At the time it was delivered there were outstanding
acceptances of *H. Jones & Co.*—as is mentioned in a memorandum at the foot of that account—to the amount of 750*l.* Had there been any
such agreement as that alleged, the credits, instead
of having been appropriated so as to reduce the old
balance from 2414*l.* 18*s.* 11*d.* to 1808*l.* 17*s.* 2*d.*, as
was done, would have been retained to meet the new
drafts.

Judgment. It may be argued however, that the account in
question could not have been framed in any other way,
the bills to which I have alluded having been at that
period current. It is alleged, as I understand the
argument, that the drafts were accepted on the faith
of certain warehouse receipts, and that the property
represented by these receipts, or the proceeds of it,
was appropriated, as well by the course of dealing,
as by express agreement, to the payment of those
advances. The account, as made out, is unquestion-
ably, quite inconsistent with any such agreement.

But all doubt upon this subject has been removed
by the account of the 30th of June following. At
that date, two of the four drafts to which I have alluded
had been paid. The others fell due a few days
later. Yet the account to which I refer, appropriating
all the receipts subsequent to the last account to
the liquidation of the old debt, bringing down a balance
of 1221*l.* 13*s.* 0*d.*, and as if to avoid all possibility
of question, that entry is in these words:

“Balance in favor of *H. Jones & Co.* on transactions
of 1847, as cash, 1221*l.* 13*s.* 0*d.*”

Now, irrespective altogether of the rule in *Clayton's*

case, I am quite at a loss to conceive how the Messrs. ¹⁸⁵¹
Jones could have more expressly appropriated all the ^{Re Browne}
 moneys which had been received by them at the date
 of that account. Suppose no accounts had been
 delivered, but that instead, Messrs. *Jones* had written
 to say that they had applied everything received up
 to that date to the transactions of 1847, and that
 there remained due to them on foot of those trans-
 actions 1221*l.* 13*s.* 0*d.*; could they have been heard to
 say to subsequent incumbancers that the mortgage
 had not been paid to that extent. If such a statement
 would not have proved payment, I know not what
 evidence would have been sufficient. But that has been
 done here and something more, because the accounts
 presented show distinctly the manner in which the
 result has been arrived at.

But the accounts furnished have a further effect,
 as it seems to me. They not only prove an express
 appropriation of all receipts up to the 30th of June, ^{Judgment.}
 but they further establish, and I think conclusively,
 the applicability of the rule in *Clayton's* case to the
 remaining accounts. Any inference which might
 have been drawn from the course of dealing between
 these parties—any weight which might have been
 attributed to the parol evidence, is neutralized by
 incontrovertible evidence which establishes that
 these parties acted in a way quite irreconcilable
 with the supposed agreement, from September 1847
 to June 1848. What is the fair result of all the
 evidence? Was there or was there not such an
 agreement as that contended for? I cannot say that
 I have any doubt as to the answer to be returned to
 this question upon the evidence. And if the evi-
 dence fairly construed, negatives the supposed agree-
 ment, is there any principle upon which we should
 be warranted in drawing an arbitrary inference, con-
 trary to the evidence, in favor of either of these
 parties.

1851. Inasmuch then, as we have not before us evidence
Re Browne of sufficient weight to establish any agreement upon which this case should be excepted from the rule in *Clayton's* case, and inasmuch as no facts exist here upon which such an agreement can be properly inferred, we are of opinion that the balance of 1221*l.* has been paid, and that there is therefore nothing due to the Messrs. *Jones* on foot of the mortgage.

It will have been perceived that the cases principally relied upon by his Honor, and pressed in argument here—*Taylor v. Kymer* (a), *Henniker v. Wigg* (b), do not seem to us to apply. Neither of those cases question the law laid down by Sir *William Grant*. In both, evidence existed, or was supposed to exist, of an agreement for a special appropriation. In *Henniker v. Wigg*—assuming the admissibility of the evidence, upon which I express no
Judgment. opinion—it was of the strongest character; the distinct admission of the parties to be affected. And in *Taylor v. Kymer*, the facts had a strong tendency to establish the conclusion drawn from them. But no such evidence exists in the present case, and the petitioners are therefore, in our opinion, entitled to succeed.

Order.

That the order made in this matter by the Judge of the County Court of the united counties of Northumberland and Durham, and bearing date &c., in so far as the same relates to the mortgage security of *Henry Jones* and *Sidney Jones*, be varied, by declaring that the mortgage of the said *Henry Jones* and *Sidney Jones* has been satisfied: And it is ordered, that the premises be forthwith sold by and under the direction of the said Judge, and that the proceeds of the said sale be applied in payment of the principal money, interest and costs due upon the other mortgages, according to their priority.

WILLARD V. McNAB.

Mortgage—Parol evidence.

1851.

July 1st and
October
28th.

In a suit by the representatives of A. against the representatives of C. parol evidence was offered, which clearly proved that A. and B. had agreed to exchange properties, B. paying A. 74*l.* 12*s.* 6*d.* for difference of value; that B. had conveyed his property to A., and after the arrangement was completed, A's property had been conveyed to C. by B. as a security for the 74*l.* 12*s.* 6*d.* which C. undertook to pay A. in goods; and it appeared from C.'s books that he had charged the 74*l.* 12*s.* 6*d.* to B., and credited and afterwards satisfied the same amount to A., and had credited the rents to B., and charged him with the repairs of the premises: and letters written by C. were also in proof, which indicated the existence of some agreement; respecting the property. *Held*—that the parol evidence was admissible; and it appearing that the debt had been paid, the defendants were declared trustees of the property in question for the plaintiff.

The bill in this case, as amended, was by *Julia Willard*, the widow and devisee of *Charles Willard* deceased, against *Harriet McNab*, *James McNab* and *Alexander McNab*, the widow, infant children and devisees of *James McNab* deceased, *Benjamin Clark*, *Charles Clark* and *Thomas Parker*, his executors, and *Samuel Bull*, as surviving partner of the said *James McNab*, praying an account of the dealings and transactions set forth in the bill, and upon payment by her of any balance found due to the defendants, or any of them, on the security of the property in the bill mentioned, that they might be ordered to convey the same to the plaintiff.

Statement.

The nature of the transactions out of which this suit arose, and the evidence establishing them, are more fully stated in the judgment.

Mr. *Mowat*, for the plaintiff cited *Dale v. Hamilton* (a); *LeTarge v. D'Tuyl* (b); *Barnhart v. Paterson* (c); and the last named case in appeal, not yet reported.

Argument.

Mr. *Turner*, for the defendants, admitted that if the evidence could be received, sufficient appeared to enable the court to make the decree asked for. He asked for the costs of the suit—there could be no

1851. question that the infant defendants were entitled to their costs, as they could not re-convey without coming to the court.

Willard
v.
McNab.

The judgment of the court was delivered by—

October
28th.

THE CHANCELLOR.—The plaintiff, as devisee of *Charles Willard*, prays to redeem the premises in question in this case, under the following circumstances: On the 16th of January 1833, *Charles Willard* the plaintiff's testator, conveyed the property in question to *James McNab*, under whom the defendants claim in fee simple. The deed is in form absolute, and purports to have been executed in consideration of 300*l.* The plaintiff alleges that this deed was not intended to operate as an absolute conveyance, but as a security for a sum of money lent to *Charles Willard*, her testator. On the other hand, the infant defendants, *James and Alexander McNab*, the devisees of *James McNab*, claim to be absolutely entitled under that deed, and plead the Statute of Frauds.

Judgment.

We have to consider, therefore, whether parol evidence is admissible under the circumstances of this case; and if admissible, whether it establishes the allegations in the bill.

It is not to be doubted, we think, that the evidence, if admissible, establishes clearly and satisfactorily the plaintiff's case. It appears that in January 1833, the north half of lot No. 18 in the 4th concession of the township of Sydney belonged to the plaintiff's testator, and the premises in question in this cause to one *McCarty*. An exchange was then agreed upon, but the *Sydney* property not being of equal value with the other, *Willard* agreed to pay to *McCarty* a sum of 74*l.* 12*s.* 6*d.* It appears that *Willard* not having the necessary funds to meet this engagement, Mr. *McNab* and his then partner *Bull*, undertook to advance the amount due to *McCarty*, and to receive the rents of the property conveyed to *Willard* until

the debt should have been discharged. It is established upon the clearest and most unexceptionable testimony, that the deed of January 1833 was executed for the purpose of effectuating that arrangement, and that the sole consideration for that deed was the sum of 74*l.* 12*s.* 6*d.* advanced by Messrs. *Bull* and *McNab* to *McCarty*.

1851.

Willard
v.
McNab

The real question then, respects the admissibility of the evidence rather than its effect. To introduce the parol testimony, the plaintiff relies upon certain entries in the books of Messrs. *Bull* and *McNab*, and upon certain letters and memoranda in the handwriting of *McNab*, sufficient, as she contends, to take the case out of the statute. In the first place, on the 12th of September 1833, *McCarty* is credited, and *Willard* charged with the sum of 74*l.* 12*s.* 6*d.* Between that date and the month of May 1837, a series of entries is to be found in the books of Messrs. *McNab* and *Bull* of this kind; the occupying tenants of the property in question are credited in their accounts with the amounts paid from time to time on account of rent, and by entries, corresponding in date and amount, those various sums are passed to the credit of *Willard*, while he is charged with the repairs of the premises. An abstract of the account of Messrs. *McNab* and *Bull* with *Willard* in relation to this transaction, which was appended to his general account in the books of the firm, and is in the handwriting of *McNab*, has been put in evidence, and is in the following words and figures:

Judgment.

Dr. to P. McCarty,.....	£74 12 6
Received.	
Dr. M.....	£30 12 6
Mrs. W.....	9 5 9
Murney.....	17 10 0
	— 57 8 3
Due.....	£17 4 3
Paid for repairs.....	2 7 0
	—
Due on account above transaction.....	£19 11 3

1851. The items on the credit side of this statement agreed with the sums received from the various tenants of this property—Dr. *Marshall*, Mrs. *Wright* and Mr. *Murney*—on account of rent.

Willard
v.
McNab.

A letter in the handwriting of *McNab* has been proved, bearing date the 4th day of May 1837, in which the following passage occurs—

“DEAR CHARLES.—According to promise, you will receive enclosed your account with *McNab* and *Bull*, shewing a balance of 35*l.* 13*s.* 1½*d.* in their favor. You will see I have taken off a part of a sum paid for repairing the house. According to the rents we have received up to this date, there appears to be a balance of 17*l.* 4*s.* 3*d.* on the amount paid to Mr. *McCarty*, and the sum of 18*l.* 8*s.* 10*d.*, a balance on goods &c., making in all 35*l.* 13*s.* 1½*d.* currency.”

Judgment. Lastly : In a letter from *McNab* to *Willard*, dated the 4th of December in the same year, having reference principally to transactions unconnected with this suit, there is this passage : “I have made out your deed.”

Unfortunately, *McNab* died suddenly a few days after the date of the above letter, and before any reconveyance had been executed—a circumstance to which this suit is in all probability attributable. *Willard* died in 1847, and the devisees of *McNab* now claim to be absolutely entitled under the deed of 1833.

Now, irrespective of the legal question, the plaintiff's case has been established upon the most clear and conclusive evidence. The only transaction between the parties, in relation to real property, was the one which took place January 1833. Beyond doubt that was a security for money advanced, which as certainly has been repaid. If there be any rule of law which excludes this testimony, it would have the effect of enabling the devisees of *McNab* to perpetrate a very gross fraud upon the plaintiff. But

it appears to us that there is no such rule. The written evidence to which I have adverted is obviously inconsistent with the deed of January 1837. It demonstrates the existence of an agreement not stated in that deed, and that alone would be sufficient to let in the parol testimony upon the principle laid down in *Cripps v. Gee* (a).

But there is another principle upon which the evidence is in our opinion admissible. *McNab*, under whom the defendants claim, having induced, or suffered the plaintiff's testator to act upon the faith of the parol agreement which it is the object of this suit to enforce, is not now in a position to object that evidence of that agreement is excluded by the Statute of Frauds. The question is not whether a parol agreement resting in *fieri* may be proved and enforced; but whether the partial execution of such an agreement does not render the reception of such evidence necessary. How can the statute apply where the parol agreement has been in part performed, and where proof of that agreement becomes necessary for the protection of one who has been induced to act on the faith of it? (b). To shut out evidence of the agreement to which the acts of part performance have reference, at the instance of one upon the faith of those representation of the existence of a binding agreement those acts were performed, would be against the plainest principles of equity, which as a general rule, require such representations to be made good. But the statute was designed to prevent frauds, not to facilitate their perpetration.

This subject having been recently under our consideration, however, it is unnecessary to examine this principle at length upon the present occasion (c). But it may be proper to remark that the doubt which I at present entertain, is, whether those cases go far

1851.

Willard
McNab.

Judgment.

(a) 4 B. C. C. 472. (b) *Eyre v. Popham*, Loft. 808-9; *Whitbread v. Brockhurst*, 1 B. C. C. 417.

(c) *LeTarge v. DeTuyll*; *Barnhart v. Patterson*.

1851. enough. It may be found, possibly, when the question calls for investigation, that there are principles which warrant the receipt of parol testimony in mortgage cases to an extent negatived, peraps, rather than sanctioned by those cases (*a*). But that enquiry is not now necessary, because the case falls clearly within the principle laid down in *LeTarge v. DeTuyll*, which was sanctioned by the court of Appeal in *Barnhart v. Patterson*.

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v.
McNab.

Judgment.

Here the consideration in the deed of January 1833, was charged against the plaintiff's testator as a debt, and as such was paid by him. He was credited with the rents of the property conveyed to *McNab*, while he was charged with the repairs. It is clear, that evidence of the parol agreement under which all this was done is necessarily admissible.

We think Mrs. *McNab's* conduct disentitles her to costs; and it having been established in evidence and admitted that the mortgage money has been paid, the plaintiff is entitled to a reconveyance.

VALLIER V. LEE.

Fraud—Undue influence.

February 18
& August 26.

Where a party being in gaol on a charge of felony, was liberated upon the present defendant becoming bail for his appearance, and having in the interval between his liberation and trial executed a deed of his property to the defendant for an inadequate consideration, afterwards filed a bill to set this conveyance aside on the ground of fraud, alleging that he had executed it under the impression, and upon the assurance of the defendant, that the deed was merely a recognizance for his due appearance to take his trial. This allegation being disproved, the court dismissed the bill, but gave the plaintiff leave to file another, if he should be so advised, to set aside the conveyance on the ground of inadequacy of consideration and undue influence.

The bill in this cause was filed by *William Vallier*

(a) See cases and text writers referred to in *LeTarge v. DeTuyll*, also, 2 Spence, E. J. 618; *Vernon v. Bethell*, 2 Eden. 113; *Clifford v. Tunnell*, 1 Y. & C. C. C. 138; 9 Jurist, 633. S. C. on appeal; *Walker v. Walker*, 2 Atk. 98; *Woollam v. Hearn*, 7 Ves. 211; *Govett v. Richmond*, 7 Sim. 1; *Hooper v. Nicholson*, 4 M. & C. 134; *Hammersly v. Baron de Beil*, 12 C. & F. 62; *Podmore v. Gunning*, 7 Sim. 644; *Davis v. Thomas*, 1 R. & M. 511; *Williams v. Owen*, 10 Sim. 390; S. C. 5 M. & C.; *Kirk v. Guardians of Bromley*, 2 Phil. 648.

against *Christopher E. Lee, William L. Perrin and James L. Perrin*, for the purpose of setting aside a deed obtained by the defendant *Lee* on the grounds set forth in the judgment. The plaintiff charged the defendants *Perrin* with the notice of the title of the defendant *Lee*, but at the hearing his counsel waived any relief on that ground and consented to redeem them, they being mortgagees of the premises in question in this suit, as well as of other lands of the defendant *Lee*.

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Lee.

Statement.

Mr. *Eccles* and Mr. *Strong*, for the plaintiff.

Mr. *Turner* for the defendant *Lee*.

Argument.

Mr. *McDonald*, for the defendants *Perrin*.

Gartside v. Isherwood (a), and the cases there cited were referred to.

ESTEN,* V. C.—This bill is filed to set aside a deed on account of fraud and for a redemption. It states that the plaintiff being seized in fee of the lands in question, and having been arrested and being in prison on a criminal charge, applied to the defendant to become bail for his appearance at the ensuing sessions to take his trial, which the defendant agreed to do, provided the title-deeds of the property were placed in his hands by way of indemnity for his doing so; whereupon the plaintiff at the request of defendant, and not suspecting that he had any other view than the one expressed by him, delivered to him the key of his trunk containing the title-deeds in question, and the defendant proceeded to the plaintiff's residence, procured them to be delivered to him, and had kept them in his possession ever since. The bill further states that the defendant thereupon, together with the plaintiff, entered into the requisite

Judgment.

(a) 1 B. C. C. 55S.

* The Chancellor had been concerned in the cause.

1851. recognizance for the plaintiff's appearance at the sessions to take his trial, and that at the time he did so, it was agreed between them that the defendant should advance money to enable the plaintiff to defend himself on his trial, and that he should hold the title-deeds of the property, and also go into possession of it and receive the rents and profits until he should be re-imbursed what he should so advance. The bill then states the plaintiff's liberation from prison, and that afterwards, and before his trial, and sometime in April 1846, the defendant requested him to accompany him to the office of Messrs. *Duggan* to see, as he alleged, about his defence; that they thereupon proceeded together to Messrs. *Duggan's* office, and that while there the defendant produced a paper writing and requested the plaintiff to sign it; that before doing so, the plaintiff enquired into its nature, purport and contents, and was told by the defendant that it was only a security for his due appearance at the sessions to take his trial. The bill proceeds to state that the plaintiff believing such to be the case signed the writing in question; that it was not read over to him, nor was any other explanation of it given to him than what the defendant stated to him as before mentioned; and that at the time of signing it he was ignorant of its nature, contents, purport and effect. In another part of the bill it is stated that the plaintiff had since discovered that the paper writing signed by him, and stated and represented by the defendant to be but a security or recognizance for the due appearance of the plaintiff at the quarter sessions, "was an absolute deed of bargain and sale, conveying the fee simple of the lands;" and in another place, "that the only explanation that the defendant *C. E. Lee* gave him of the said pretended deed at the time the plaintiff was pressed or urgently requested as aforesaid to sign the same, was, that it was a mere security or recognizance for the due appearance of the plaintiff at the said

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quarter sessions, and that the plaintiff would not have signed the same if he had known the nature thereof."

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Lee.

It is further stated in the bill that the plaintiff underwent his trial and was acquitted; that the property is very valuable, being worth 400*l.* at the least, and that the annual value was 40*l.*, whereby the defendant *Lee* had been greatly overpaid what he had advanced. The answer admits the original title of the plaintiff, and the agreement respecting the defendant's indemnity against becoming bail for the plaintiff substantially as stated in the bill, but states that the plaintiff and defendant had been in treaty for the sale and purchase of the lands in question at the time of the plaintiff's arrest, and that after his liberation on bail, and before his trial, such treaty was renewed, and it was finally agreed between them that the defendant should purchase the property for 100*l.*, to be paid in manner specified in the answer; that thereupon the defendant gave instructions to Messrs. *Duggan* for the preparation of a conveyance of the property, and that on the 23d of March 1846, the plaintiff accompanied the defendant to Messrs. Judgment. *Duggan's* office and there executed the deed mentioned in the bill, which had been prepared in pursuance of such instructions; that the deed was fully explained to him and he perfectly understood what it was, and in fact executed it in pursuance of the agreement before mentioned; that the balance of the purchase money, after deducting the probable expense of the plaintiff's defence, was secured, and afterwards paid in manner specified in the answer; that thereupon, and not before or otherwise, the defendant entered into possession of the property and had made divers improvements upon it, and that the cash value of the property did not exceed what he had paid for it. The answer insisted that the defendant was a purchaser for valuable consideration *bona fide*, and denied all fraud.

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Lee.

The most material part of the plaintiff's evidence consisted of admissions by the defendant, deposed to by *Giester, Lang* and *Huffman*. The one deposed to by *Lang* does not agree with the others, and is, I think, wholly incredible. Those deposed to by *Giester* and *Huffman*, if they were in fact ever uttered by the defendant, are wholly insufficient to countervail the evidence of *Smyth*, an intelligent and respectable witness, the decided and clear allegation of the answer, and the facts of the case as they are not disputed; all of which convinces my mind, that the transaction which is the subject of this suit was a purchase of this property, and that the defendant was perfectly aware what he was doing when he executed the deed in question, and was well acquainted with its nature and effect.

Judgment.

The evidence, I think, wholly fails to establish the fraud complained of in the bill, which is, that the defendant procured the plaintiff to execute this deed by persuading him that it was only a security or recognizance for his due appearance at the sessions, and that he was wholly ignorant of its contents when he executed it. Whether the purchase, which I think really took place of this property upon the occasion referred to, is or is not liable itself to impeachment; whether the circumstance of its taking place in the interval between the liberation and trial of the plaintiff, when he may be supposed to have been somewhat in the power of the defendant; the inadequacy of the consideration, which I think really existed; and the circumstances attending the payment of that consideration, combined with the declarations of the defendant, are or are not sufficient to afford ground for questioning this transaction, are points on which it would be very unfair to express any opinion. No such case has been presented in the bill; defendant has never been called upon to meet such a case, and his own answer furnishes

in part the grounds, if any do indeed exist, for entertaining any suspicion on the subject. The case presented by the bill wholly fails, and it would be impossible under a record so framed to administer relief, upon the ground that the purchase which took place between these parties was fraudulent and void, however strong the grounds may be (if they are so) to conjecture that such may have been the case. If this purchase is to be questioned, it must be in a separate suit. The present bill must be dismissed, and, I think, with costs; for the plaintiff has been shewn to have stated in his bill what he knew to be untrue; and the grounds upon which any suspicion may be entertained, that the purchase of the property in question was not *bona fide* or capable of being upheld, are at present mere matters of conjecture, upon which it would be improper to act.

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The bill must be dismissed with costs, and with- Judgment.
out prejudice to the plaintiff's filing any other bill that he may be advised to file; but this reservation is not to be construed into any encouragement to file such a bill, upon the propriety of doing which the court desires, as at present advised, to express no opinion whatever.

SPRAGGE, V. C.—The case made by the plaintiff's bill is in substance this: That he was owner of fifty acres of land, being part of lot No. 8 in the second concession of the township of York; that in March 1846, being in gaol on a criminal charge, he applied to defendant *Lee* to become bail for him; that *Lee* insisting upon being indemnified, plaintiff gave him the key of a trunk containing his title-deeds of the land in question, and that *Lee* thereupon got the title-deeds from the person who had charge of the trunk; that *Lee* became bail for plaintiff; that afterwards in the month of April, and before the trial, (at which plaintiff was acquitted,) *Lee* took plaintiff to

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Judgment.

the office of Messrs. *Duggan* brothers, for the purpose, as *Lee* said, of seeing about the defence of plaintiff against the charge on which he had been arrested; that while there he produced a paper writing and requested plaintiff to sign the same; that upon plaintiff enquiring what was the nature of the paper writing, *Lee* replied that it was only a security for the due appearance of the plaintiff at court to take his trial; that *Lee* pressed plaintiff to sign the paper, said he was in a hurry and had other business to attend to, and thereupon, plaintiff confiding in *Lee's* representations, signed the paper. *Lee's* explanation of the nature of the paper as thus stated in the bill, might mean either that it was a security to him for the appearance of the plaintiff to take his trial, or a security in the nature of a recognizance for that purpose. If the former, such security might be by deed of conveyance with an understanding between the parties that *Lee* should reconvey in the event of plaintiff's appearing and taking his trial and otherwise indemnifying *Lee*. If the latter was meant, then *Lee* misrepresented the nature of the instrument if he represented it to be a recognizance for plaintiff's appearance when it was in truth an absolute deed of conveyance. It is clear however, from other passages in the bill and from its general tenor, that plaintiff means to charge that *Lee* led the plaintiff to believe that he was executing a paper differing essentially in its nature and character from what in truth it was, and not merely that the paper he was executing, (he not misrepresenting its contents,) was to stand as a security to *Lee* that plaintiff should appear and take his trial. In a subsequent part of the bill the plaintiff says that he hath since discovered that the paper writing, so as aforesaid signed by plaintiff, and stated and represented by the said defendant to be but a security or recognizance for the due appearance of plaintiff, is an absolute deed &c.; and in the charging part of his bill, he

says that the only explanation *Lee* gave to him at the time as to the said pretended deed, was, that it was a mere security or *recognizance* for the due appearance of plaintiff to take his trial.

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In several parts of the bill it is alleged and insisted upon, that the paper signed by plaintiff was not read over or explained to him.

The gist of the plaintiff's case then is, that a paper was presented to him for signature; that it was neither read nor explained to him; that he was uninformed and ignorant of its contents; that defendant *Lee* untruly represented it to be a mere security or *recognizance* for his appearance, while it was in fact an absolute deed of conveyance. This is expressly denied by *Lee* in his answer. One witness, *William Lang* gives evidence of a conversation between *Lee* and himself in the Spring of 1846, after plaintiff had been tried and acquitted. This witness says that *Lee* told him that he and the plaintiff went together to the office of Messrs. *Duggan*, and that plaintiff had there signed a deed instead of a bail-bond; that it was a deed of the land in question; that *Lee* took plaintiff to the office to get him to sign a bail-bond, and that *Vallier* was so much scared that he signed a deed instead of a bail-bond; that he was so much scared that he did not know what he signed. Apart from the objection that the conversation deposed to, not having been put in issue, the evidence of it cannot be read, it would appear substantially to support the case made by the plaintiff's bill. Against this however, is the answer of defendant *Lee*, and his answer is supported as to plaintiff's being made acquainted with the nature and contents of the deed, by the evidence of *Edward B. Smith*, a clerk in the office of Messrs. *Duggan*, and a subscribing witness to the execution of the deed. He swears that he explained to *Vallier* the short contents of the deed,

Judgment.

1851. viz: the parties, the consideration, the land conveyed.
Vallier and that it was an absolute deed. He does not know
v. Lee. that he used the words "absolute deed"—he says he
may have done so, as he frequently did in describing
deeds. He does not recollect reading over the deed
to the plaintiff, he thinks he did not, but that the
nature and short contents were fully explained to
him; that he appeared perfectly to understand the
same; that the deed was thereupon freely and voluntarily
executed by the plaintiff; and the witness adds,
that it is his invariable practice fully to explain the
contents of an instrument previous to execution by
an illiterate person or by one whom he supposes to
be illiterate. He says further, that he recollects
nothing being said about *Lee's* bailing the plaintiff,
or of the plaintiff securing *Lee* for bailing him. He
understood the deed to be an absolute conveyance,
he heard nothing to the contrary.

Judgment.

Against this evidence there is nothing but the
alleged conversation deposed to by *William Lang*.
If *Smith's* evidence be true, and that of *Lang* also
true, then *Lee* admitted to *Lang* that there had been
practiced upon the plaintiff a fraud which in fact
had not been practiced upon him. Even supposing
that *Lee* had previously represented to the plaintiff
that the paper he was about to execute was merely a
security or recognizance for his appearance, it is difficult
to believe that he could have remained under
that impression after the explanation of its contents
given to him by *Mr. Smith*.

Other witnesses, *Huffman*, *Giester* and *Philip Whitney*, relate conversations with *Lee*, to the effect
that he held the premises only as security to indemnify
and reimburse himself. None of them depose to any
admission by *Lee* that any fraud or misrepresentation
had been practiced upon plaintiff in the execution of
the deed, or that the instrument executed was different
in its nature or contents from the

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instrument intended to be executed. What is deposited to by them might be good evidence in support of a case entitling the plaintiff to relief, but they are not evidence of the case made by the plaintiff's bill. Evidence is also given of the value of the property, from which it would appear to be worth three or four times the amount agreed to be paid for it by *Lee*. This also might be material upon a proper case made. What took place at *Lee's* store on Hallow e'en, would appear, from the evidence, to be of a suspicious nature; but that, as well as other circumstances, may possibly admit of explanation. Upon the evidence as it stands, however, they certainly have not the appearance of fair dealing on the part of *Lee*.

Upon the whole, I think the plaintiff has failed in establishing by evidence, the case made by his bill, and relief certainly cannot be forgiven upon evidence of circumstances which are not made a ground of judgment, complaint upon the record (a).

I confess however, I think the transaction does not appear to be a creditable one, as regards the conduct of defendant *Lee*, even upon his own shewing. From his own answer, it appears that he made the alleged purchase shortly after he had bailed *Vallier* out of prison, and between that and his trial. A criminal charge was hanging over *Vallier's* head. His defence on that charge, including the procuring the attendance of witnesses and feeing counsel, was all in the hands of *Lee*. While such was the relative position of the parties, *Lee* took the occasion, if he did not use the occasion, to purchase from *Vallier* over whom his position necessarily gave him great influence, the farm on which he lived, at a price which, from other evidence, appears to have been but a third or forth of its value.

(a) *Gordon v. Gordon*, 3 Swanst 472; *Montesqueiu v. Sandy*, 18 Ves. 312.

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Lee.

The mode of payment too, is open to remark. *Lee* says that a calculation or estimate was made between himself and *Vallier* of what would be coming to *Vallier* of the purchase money, after deducting the claims that *Lee* then had or might thereafter have against *Vallier* for his costs and charges in respect of the bailing of *Vallier*; defending him upon the said charge; and assisting him with money and otherwise in his defence, and for his (*Lee's*) loss of time and trouble. Making these deductions, and also 2*l.* 7*s.* 8*d.* due on a note by *Vallier* to *Lee*, the purchase money was reduced to about 67*l.* These deductions are partially and not very satisfactorily made out in a schedule to the answer.

Lee says he then gave his note, not however for 67*l.*, nor does he explain why not for that sum, but for 53*l.*, and that note is expressed to be in full payment for the land in question.

Judgment.

The whole transaction is a very questionable one as it at present appears. It is difficult to avoid the suspicion upon what we now see, that *Lee* made an undue use of his position in dealing with *Vallier* for the purchase of the land. I think his conduct in the transaction should disentitle him to costs (*a*).

In the case of *Montesquieu v. Sandys*, a case not so strong against the defendant as this case, the bill was dismissed upon the same ground as the bill in this case was dismissed, but without costs.

The question of costs was reserved for consideration, and finally the bill was dismissed without costs: And the decree gave the plaintiff leave to file another bill, if he should be so advised.

1851.

CANNIFFE V. TAYLOR.

Practice—Substitutional service.

Under the Provincial Statute 14 and 15 Victoria, chapter 10, the rule respecting substitutional service is enlarged to this extent; that substitutional service is now authorized upon any agent or person in charge of any property which is the subject matter of the suit (*a*). October 3.

The bill in this case was filed by *Joseph Canniffe* against *William Johnston Taylor*, setting forth an agreement between plaintiff and *Jane Taylor*, (who held a contract with King's College,) for the sale to plaintiff of a lot of land in *ThurLOW*, under which plaintiff entered into possession; that *Jane Taylor* had assigned to her son *George Taylor*, who afterwards assigned to his brother, the defendant; and that defendant some years afterwards [1847] re-assigned to the said *George Taylor*, and that he in 1851 pretended to again transfer the said contract to *William Johnston Taylor*, the defendant, who for some years previously had been, and still was, absent from Canada and supposed to be residing in California; that there was no consideration in money or otherwise for the transfer to defendant.

Statement

The bill stated that plaintiff had applied to the college for a deed in his name, but which he had been unable to procure; that the defendant afterwards obtained a deed from the college in his name, and that an action of ejectment *had been commenced* in the name of the defendant against the plaintiff, to turn him out of possession, and prayed a specific performance of the contract with *Jane Taylor* and an injunction to restrain the ejectment.

Mr. *Vankoughnet*, Q. C., on a former day had moved for an order for substitutional service of the subpoena upon *George Taylor* as agent of the defendant, and also on his attorney in the action of ejectment, and read an affidavit shewing that the deed

Argument.

(a) See also *Doremus v. Kennedy*—*post*.

1851. from King's College to the defendant, had been procured through the agency of *George Taylor*. The motion having stood over for consideration, the judgment of the court was now delivered by—
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Taylor.

THE CHANCELLOR.—This is an application for substitutional service under the statute 14th and 15th Victoria, chapter 10.

In considering this motion with reference to the general provisions of the statute, we have found considerable difficulty in reconciling the course of procedure thereby authorized with the established practice of the court.

Judgment. Judging from the preamble of the act, as well as from several of its substantive provisions, it seems to us probable that the Legislature designed this measure to apply to the courts of common law only, and that the difficulty we have experienced has arisen from the casual introduction of a word by which the act has been inadvertently made applicable to this court.

The preamble says: "Whereas, there are by law no means provided for taking proceedings against parties who are absent from Upper Canada, unless by process under the absconding debtor's act." Now that recital, although quite true as applicable to courts of common law, is quite erroneous if applied to proceedings in this court.

Again: Although the act is obviously designed to facilitate proceedings, the period limited by the third clause for entering appearances is very much longer, in some instances at least, than is allowed by the established practice of this court.

Lastly: Where there has been substitutional service under the provisions of this act, and default in entering appearance, all further proceedings are to

be *ex parte*. Now, under the established practice, when there has been actual service upon a party within the jurisdiction, and default, the plaintiff is still obliged to serve a notice of motion before he can obtain an order to have the bill taken *pro confesso*. The result would be, that an approximation to service—service upon a supposed agent—would be more effectual in this court than actual service upon the party.

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Taylor.

But we are not at liberty to act upon such an inference. The statute applies in express terms to this court, and we are therefore bound to carry out its provisions, so far as they are capable of application.

It cannot be doubted, we think, that the Legislature intended to sanction the service of process, either out of the jurisdiction, or upon an agent, without the previous sanction of the court.

As to the description of agent upon whom service may be made, there is more room for doubt. In *Passmore v. Nicholas* (a), we had occasion to consider the English rule upon this subject, and to define the sort of agency which would warrant an order for substitutional service. We then thought that the agent to be served must have been an agent in relation to the subject matter of the suit, and in a degree sufficient to warrant the conclusion that the acceptance of process would be within the scope of his authority. We do not regard the rule there prescribed as the mere expression of an existing practice. We agree in the opinion expressed by Lord *Lyndhurst*, that some such limitations as are there pointed out, are necessary to the safe working of the practice of substitutional service.

In this respect, however, the statute appears to us

(a) Ante vol. I, page 130.

1851. *Cannillo*
v.
Taylor. to have somewhat enlarged the previous rule. I speak, of course, with an exclusive reference to the practice of this court. It has introduced a rule altogether new to courts of common law. But, with reference to proceedings here, it authorizes service "upon any agent, or person having charge of any property, real or personal, of such persons in this province." The form of the expression, "person in charge of any property," would seem naturally to point to an actual occupation or manual possession. That however, would be, in our opinion, too narrow a construction of the act. The interests of the defendant may not admit of actual occupation or manual possession, and yet a party may be in charge of it, and the acceptance of process may, for that reason, be much more within the scope of such an agent's authority than in the case of mere occupation of land, or possession of a chattel.

Judgment.

But this clause gives rise to a further difficulty. It authorizes service "upon any agent or person in charge of any property." Does this mean that in a suit respecting any property process may be served upon the agent having charge of *that property*? or does it mean that in a suit respecting any property, process may be served upon any agent in possession of *any other property*? Possibly, the words of the statute may be large enough to admit of the latter construction. But they certainly admit of the former construction also; and the other would be, in our opinion, so unreasonable, that we have no difficulty in adopting the conclusion, that the Legislature intended to use these expressions in the more limited sense. An agent, placed in occupation of a house or farm, may have every requisite for the due fulfilment of the duty assigned to him, but may be altogether wanting in the qualities which would fit him to manage the defence of a suit. In that respect the rule actually introduced by the statute, and we con-

strue it, may perhaps be found hereafter to require limitation. But, to give to these expressions the more extended signification, would be to introduce a rule, as it seems to us, in the highest degree unjust. We are unable to discover any principle of reason upon which, in a suit appertaining to matter B., substitutional service upon a party quite unconnected with, and uninstructed respecting it—upon a party in charge, not of matter B., but of property A.—would be warrantable. The subject matter of the suit B. may be the administration of a trust, or a partnership account, while property A. may be a house or a promissory note, quite unconnected with the subject of the suit. A construction which would admit of substitutional service under such circumstances, appears to us so unreasonable and so likely to be productive of injustice, that we feel bound to resist it.

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Taylor.

In our opinion, therefore, the rule, as it existed before the statute, is enlarged, to this extent: that substitutional service is now authorized upon any agent or person in charge of the property which is the subject matter of the suit.

Judgment.

With respect to service of process beyond the jurisdiction, the statute appears to us to be quite inapplicable to proceedings in this court. The third section provides, in relation to this matter, that "after the expiration of the time for such an appearance, and the allowance of such service as aforesaid, the plaintiff in such action or suit may enter an appearance for such person, and after an appearance entered, may proceed to decree judgment and execution thereon, in the same manner and terms as in ordinary cases of personal service of process." Now, by the ordinary practice of the court, where process is served without the jurisdiction, no time is fixed for the defendant to put in his answer. That is limited in each particular case according to circumstances. Were a plaintiff, therefore, to serve process out of

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Taylor.

the jurisdiction, under this act, without the previous permission of the court, and without having a time fixed for the defendant to file his answer, there never could be a default; and consequently, he never could be in a position to move that the bill might be taken *pro confesso*.

This portion of the act appears to us to be inapplicable—a conclusion the less to be regretted, perhaps, because complete regulations in relation to the matter are already in existence.

Judgment.

It will here be perceived that our observations have been directed to the consideration of the effect of the statute in question upon the general practice of this case, rather than to the particular circumstances of the case immediately before us, which seems tolerable free from doubt. We think that *George Taylor* is an agent within the meaning of the act. It is quite possible that service upon the attorney at law of the defendant, which was asked by the motion, and which we direct, would be sufficient in the cause, altogether irrespective of the provisions of the act.

RE DUGGAN.

Practice—Lunacy.

November 25

Where the estate of a person who has been found to be a lunatic is of small amount, the court will combine in one reference to the Master all the usual inquiries, although the several objects are in England the subjects of distinct and separate references.

Statement.

In this matter a commission in the nature of a writ *de lunatico inquirendo* had been obtained, and the inquisition having been returned to the effect that the subject of the commission was *non compos mentis* and incapable of governing himself or managing his affairs,

Argument.

Mr. Murphy now applied for a reference to the Master to enquire who were the heir at law and next

of kin of the lunatic; to ascertain the amount of his property; to approve of proper persons to be committees of his person and estate, and of a sufficient sum to be allowed for his maintenance; grounding his application upon an affidavit swearing that the property of the lunatic did not exceed in amount the sum of 2000*l*.

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Re Duggan.
Argument.

Per Cur.—According to the practice in England, the several objects embraced in this motion, are the subject of distinct references; but the object in the present instance being to avoid expense by combining them in one order of reference, and it having been shewn that the assets amount to so comparatively small a sum, let the order be made as prayed.

Judgment.

ROLPH V. CAHOON.

Practice—Service of subpoena.

Where between the time of obtaining an order permitting service out of the jurisdiction and the service of the subpoena, the name of a town (before the Mayor of which the affidavit of service was directed to be made,) had been changed; a certificate of the town clerk, sealed with the corporate seal of the town under its new name, was received as proof of the fact of such change having taken place.

Novemb'r 25

This was an application by Mr. *Brough* for leave to enter an appearance for the defendant, who had been served with process out of the jurisdiction of the court. An order had on a previous occasion been obtained, making service of the subpoena and of that order, together with an office copy of the bill, upon defendant, in the territory of Wisconsin, good service, and for proving such service and the identity of the defendant by an affidavit to be sworn before the mayor or other chief magistrate of the town of Southport in that territory. Before the service was affected, Southport had, by an act of the Legislature of Wisconsin, been erected into the city of Kenosha and the service having been effected an affidavit of it and of the identity of the defendant was made before the mayor of Kenosha, and a certificate was

Statement.

1851. produced under the corporate seal, and signed by the town clerk of Kenosha, testifying to the fact of the town of Southport having been erected into the city of Kenosha. It also appeared by the certificate of the Registrar of this court, that the defendant had made default in entering an appearance within the time limited by the order.

Rolph
v.
Cahoon.

Statement.

The Court, under these circumstances, directed an order, giving the plaintiff leave to enter an appearance for the defendant, to be made.

Judgment.

ROSS V. THOMPSON.

Practice—Foreclosure.

December 5. It seems that the plaintiff will not be entitled to the absolute order of foreclosure against a subsequent mortgagee and the mortgagor, unless he be in a situation to reconvey the legal estate in the mortgage premises.

In this case a bill had been filed by a second mortgagee against the first mortgagee, the mortgagor, and a subsequent mortgagee, and a decree had been made directing the redemption of the first incumbrancer's charge and the foreclosure of the subsequent mortgagee and the mortgagor, in the usual, manner, in default of payment. The Master having made his report, the plaintiff attended at the time and place appointed therein, to pay the amount found due to the first mortgagee, but he did not, nor did any one on his behalf, attend to receive the money, and it was further shewn by affidavit, that he was absent from the Province, without having conferred on any one, so far as it appeared, any sufficient authority to receive the money.

Statement.

Under these circumstances, application was now made by—

Mr. McDonald, on behalf of the plaintiff, for liberty to pay the amount found due into court, and for an order for redemption.

Argument.

Mr. *Mowat*, for the first mortgagee, and also for a subsequent mortgagee to the plaintiff, did not object. The mortgagee did not appear.

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Hans
v.
Thompson.

The court directed the order to be drawn up in the judgment, terms of the motion.

COOK V. WALSH.

Practice—Re-hearing.

This cause had been heard and re-heard before December 5. Mr. Vice Chancellor *Jameson*, and had been again re-heard before this court, (see ante. vol. 1, page 209,) composed of The Chancellor, Mr. Vice Chancellor *Jameson* and Mr. Vice Chancellor *Esten*, but judgment had not been pronounced when Mr. Vice Chancellor *Jameson* resigned. The Chancellor and Mr. Vice Chancellor *Esten* differed in opinion and consequently no judgment was pronounced.

Mr. *Mowat*, for the plaintiff, now applied for a re-argument, which, under the peculiar circumstances of the case, was ordered.

LYMAN V. KIRKPATRICK.

Practice—Mortgage—Bankrupt.

Where a mortgagee had become bankrupt, and he, together with his assignees, had filed a bill to foreclose the mortgage, a final order of foreclosure was granted, although one of the assignees, on account of his absence from the country, had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment.

December 5.

In this case, it appeared that the mortgagee had become bankrupt, and he and his assignees were plaintiffs in this suit, which had been instituted for the foreclosure of the mortgage. One of the assignees was in England; the other two, together with the mortgagee, had given a power of attorney to receive the mortgage money, in the payment whereof default had been made. Under these circumstances—

Statement.

1851. *Mr. Morphy*, for the plaintiffs, now applied for the final order of foreclosure, upon affidavits of the execution of the power of attorney; of attendance by the attorney at the time and place appointed by the Master's report for payment of the mortgage money; of the non-appearance of the defendant or any one on his behalf, and of the non-payment of the money to any of the plaintiffs in Canada, or (to their belief) to the plaintiff who was in England, citing *Smith v. Jameson (a)*.

Judgment. *Per Cur.*—In the case of *Smith v. Jamesons*, cited in the argument, Lord *Ellenborough* ruled that one of several assignees of a bankrupt could receive money due to the bankrupt's estate. Upon the authority of this case, therefore, we think the final order may go.

THE ATTORNEY GENERAL, AT THE RELATION OF THE
MUNICIPALITY OF THE TOWNSHIP OF NEPEAN, V.
THE BYTOWN AND NEPEAN ROAD COMPANY.

Road Companies' Act—Municipal Corporations.

Sept'r 23. The consent of the Governor in council is not necessary to justify a road company, formed under the statute 12 Victoria, chapter 84, in taking possession of a public highway, the property of the crown, for the purpose of making a road over it.

Nov'r 29. A Municipality has the right of prohibiting the proceeding with any road within the limits of their jurisdiction, and the making or improving of which, by a road company formed under the 12th Vic. chapter 84, was commenced before any opposition was made thereto, but without the permission of such Municipality. Notice of such opposition, if duly given before the work is commenced, according to the second section of that statute, has the effect of an interim injunction to restrain the commencing of the road. But, though such notice is not given in time for that purpose, the power of prohibition conferred upon the Municipal Councils is not forfeited.

Statement. This was a motion (the notice of which was served by leave of the court along with the subpoena) for an injunction in terms of the prayer of the information, which is set forth in the judgment of the court. The information was filed on the 10th day of June 1851,

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and stated, that the defendants being a corporation, created under the provisions of the act 12 Victoria, chapter 84, registered on the 21st day of April last, the documents required in that behalf by the said act, and which documents bear date that day; that the company forthwith commenced to construct a plank or macadamized road from the town of Bytown to a certain place called Bell's Corners, at the junction of certain other roads called the Richmond and Ramsay roads, and which plank or macadamized road the said company had commenced and intended to construct in, over and along the existing public road or highway, (and which was, and for years had been used as such) between those two places; and for that purpose, the company, their servants and agents had taken possession of about half a mile of the said existing public highway, and had broken up the same by digging up, carting away and removing the soil and stones of and from the said highway, and had in this manner made excavations along the line of road for the said half mile, or thereabouts to the depth in some places of three feet; that though the company had not yet so obstructed the road as to leave no room for the passage of horses or carriages along the same, still their proceedings made the road less commodious and convenient for the passage of horses and carriages, and by means of the excavations rendered the road dangerous to passengers at night; that the said existing public road is and was when so taken possession of as aforesaid, the property of the Crown, and had been taken by the company without the approval of the Governor in council, and the company were also proceeding with their road without the permission of the Municipal Council of the township of Nepean, or the county of Carleton.

The information further stated, that the said company had been formed secretly, and commenced the

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Road Co.

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said work" before even the formation of the company was known to the residents of the said township, and the object of such secrecy was, to prevent any notice being given to them of any intention to oppose such new road before the work should be commenced; that as soon as possible after the formation of the said company became known, and on the 14th or 15th of May, more than twelve freeholders resident within half a mile of the said line of road, gave notice in writing to *Robert Lees*, the recorded treasurer, and to *Nathaniel Burwash*, one of the directors of the said company, that such freeholders intended to oppose the formation or improvement of the proposed line of road, by the said company, at the next sitting of the Municipal Councils of the township of Nepean and in the county of Carleton respectively; that the said company had not been recorded, nor had the said freeholders any means of ascertaining, nor were they in fact aware who was, or who claimed to be the presiding chairman, or other presiding officer of the said company, if any such the said company had, but the said *Lees* and *Burwash* at the time of the said notice being given to them respectively, were requested to lay the same before the presiding officer of the company at their earliest convenience; that the Municipal Council of the township of Nepean had jurisdiction throughout the line of the said intended road, and such council at their next sitting thereof—that is to say, on the 22nd day of May last—passed a by-law forbidding and prohibiting the said company's removing any of the soil, stones, gravel, or sand from any part of the said public highway, or in any way whatever interfering therewith without the leave of the said council, or of the council of the county; that the company, notwithstanding the circumstances aforesaid, continue *their work and intend to proceed therewith along the whole line of the said road.* And the information concluded with the prayer as set forth in the judgment.

Statement

Numerous affidavits were filed on both sides, chiefly in reference to the allegations of the information as to the secrecy with which the company had been formed and had commenced operations. It also appeared that on the 9th of April 1851, one *John McKinnon*, who was unconnected with the defendants' company, had given notice to the reeve of the township of his intention to form a company to make a road between Bytown and Bell's Corners under the statute, and requested the reeve to call a meeting of the council in order that the permission of the council might be obtained; that a meeting was called accordingly and took place on the 5th of May, when a by-law was passed sanctioning the formation of the proposed company and directing the reeve to take stock therein to the amount of 1000*l*, for the payment of which the same by-law provided. The names of any of the parties who were to form the proposed company were not mentioned in this by-law, but it appeared that the members of the council knew nothing, at this time, of the intention to form the rival company against whom the present suit was afterwards brought.

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Statement.

The motion was to have been made on the 17th of June, but was deferred until this day to give time for filing affidavits, and in consequence of some negotiations for a compromise; consequently, the motion was now, by consent, argued as if made on the 17th of June.

Mr. *Mowat*, for the motion.

Mr. *Vankoughnet*, Q. C., contra.

Argument.

For the plaintiff, it was contended, that the defendants were taking up the public highway for the purpose of carrying on their works; that this road was the property of the crown, and therefore, by the express words of the 1st section of the 12th Victoria,

1851. chapter 81, the defendants were bound to have first obtained the permission of the Governor in council.

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v.
The Nepean Road Co.

If it was not the proper construction of the act then it was contended that the Municipal Council had a right to prohibit the formation of any road within the limits of their municipality; that the time at which that prohibition is made known is unimportant; but if otherwise, than in this case the council had been prevented giving such notice earlier by the fraud of the company.

Argument. If the construction contended for by the other side be correct, then companies formed under the statute 12 Vic. ch. 84, have a right to take possession of any of the roads now in use, and would have a right to enjoy the profits of them for twenty-one years, and after that time the municipal councils could only obtain them from the company on payment of their full value. This would be most unreasonable, as, in many instances the company could take roads already very good but which are not either "macadamized, gravelled or planked."

The effect of this act is to abridge the rights of the public. Now, whenever that is the case, the principle of construction is, that the court will lean most favorable to the public, and the words of the statute must be express to restrict the rights of the public.

Salkeld v. Johnson (a), and cases there collected. A late case bearing on this point is *Ex parte Bishop of Exeter re Gorham v. the Bishop of Exeter* (b), *Stockton Railroad Co. v. Barrett* (c), *Marsh v. Higgins* (d).

And further, it was argued that this company had not been legally constituted.

For the defendants.—The plaintiff is not entitled to

(a) 2 Ex. R. 278, S. C. 1 Hare, 208. (b) 19 L. J., 279 Q. B. (c) 11 Clk. & F. 590. (d) 1 Price, Rep. 253.

an injunction in this case, for we submit, that notwithstanding any opinion that may exist as to the propriety of the conduct pursued by these defendants in the formation of the company, still no power exists in the court to restrain them from carrying on their work in the manner sought by this information.

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The principal argument upon which the right to the injunction in this case is grounded is, that the road is the property of the Crown, and therefore that the consent of the Governor in council ought to have been obtained. This is not so now, as by chapter 81 all roads are vested in the municipalities of the respective townships; and the Road Act (ch. 84) expressly authorizes these companies to make use of public highways.

The by-law of the Council only forbids the Nepean Road Company making the road, and another by-law was passed authorizing another company to make it. But the Council could not authorize one and forbid another. They must forbid both or neither.

Argument,

Section 191 of chapter 81, authorizes the township councils to improve the roads in their respective municipalities. It was objected, that the town council should therefore have filed a bill against the defendants, and that an information at the suit of the Attorney General was improper.

Reference was also made by council to *Logan v. Earl of Courtown* (a); *North British Railway Co. v. Tod* (b); *Coleman v. The Eastern Counties Railway Co.* (c); also, sec. 31 of 12 Vic. ch. 81, subdivisions 10, 17, 18.

The judgment of the court was delivered by—

Judgment,

THE CHANCELLOR.—The defendants are a company incorporated under the provisions of the statute

Nov'r 23.

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1851. 12 Vic. chap. 84, for the purpose of constructing a road from the town of Bytown to a place known as Bell's Corners. In the progress of their work, the defendants, at the time this information was filed, had commenced to improve a portion of the public highway between Bytown and Bell's Corners, having adopted it as part of the line of road which they proposed to construct.

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The information prays that an injunction may issue, "restraining the defendants, their servants agents and workmen from digging up or excavating any part of the said existing road, and from removing any of the soil, stones, gravel or sand from any part of the said public highway, or in any way whatever interfering therewith, without the leave of the Governor in council, or of the said municipality of Nepean, or of the council of the county of Carleton; and from in any way obstructing, or continuing the obstructions already made or caused by them, in or upon the said existing public road, and from doing any other damage to the said road, or continuing, or suffering to continue, any damage already done thereto by them, their servants, agents and workmen, and from proceeding to make a plank, macadamized or other highway, on, over, or along the said existing public road, or highway; and that they may be directed to restore the said existing public road or highway into the same state and condition as the same was in before the said company commenced the making of their said intended road."

Judgment.

The application was sustained in argument upon three grounds. It was argued, first: that the secrecy observed in the formation of this company was such as to preclude the possibility of any opposition being made to the projected improvement under the second section of the act; and that, consequently, the company had not been legally constituted. It was argu-

ed, secondly, that this company having illegally taken possession of Crown property—the public highway—without the consent of the Governor in council, ought, for that reason, to be restrained. Lastly, it was contended that the interruption of the highway by these defendants, against the prohibition, or, at least, without the permission of the municipality of the township of Nepean, was illegal—a public nuisance—proper to be restrained by the injunction of this court.

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We think that this application cannot be sustained upon the ground first presented. It is to be observed that the Legislature have not thought it necessary to require that any information should be given to the public prior to the actual incorporation of such companies. The instruments by which they are constituted must be registered under the statute, in order to their incorporation. But no provisions has been made for securing to the public any previous information. This state of the law renders it difficult, no doubt, and often impossible for those interested in opposing such a work to avail themselves of the provisions of the second section. But if the Legislature have made no provision upon the subject—if they have thought it right to authorize any number of persons not less than five to form themselves into an incorporated company, without requiring any previous publication of such an intention, can we pronounce such a company to be illegal for the want of that publicity, which, however expedient it may seem, has not been required?

Judgment.

The difficulty of maintaining the position contended for seems to be greatly increased, if not rendered insuperable, by a clause in an act passed during the last session, for the purpose of amending the statute in question. In framing the 14th and 15th Vic. ch. 122, the Legislature had in their view the very incon-

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venience which we have been considering, and the tenth section of that statute shews the extent to which, in their estimation, that inconvenience required remedy. That clause, however, does not obviate that secrecy in the formation of these joint stock companies which is here complained of, but only provides for the service of notice upon each municipal councillor of the locality ten days before the commencement of the work.

Judgment.

But, apart from the simple fact that the formation of this company was unknown, numerous affidavits have been filed, for the purpose, I presume, of shewing a studied concealment by these defendants, both before and after its formation. Without determining what course it might be proper to pursue, had such a state of things been established, the evidence before us, in our opinion, fails to prove such a case. To some extent, the affidavits are certainly conflicting. It is sworn, on behalf of the defendants, that the formation of a company for the construction of this road, had been mentioned by the present President of the company to a great variety of persons in the neighborhood, who were interested in the work. On the other side, it is said that this particular road was not specified. But, it is not denied that those parties were informed that a meeting was about to be held in order to the formation of a company for the construction of some road in the vicinity, and that their attendance was requested. Now, unquestionably, that is not a course which would have been pursued had secrecy been an object. Then the act of incorporation was registered in the public office, where any party interested might have had the desired information. The road is in the immediate vicinity of a populous town, and considerable numbers of men were engaged on the work the moment the company had been formed. Lastly: several persons have sworn that the formation of this company

was matter of notoriety at Bytown. Assuming the law then to be clearly in favor of the application, it seems to us to fail, in this respect, on the evidence.

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Upon the second ground also, our opinion is in favor of the defendants. The first section of the act for the formation of joint stock companies for the construction of roads and other works in Upper Canada, provides, "that any number of persons not less than five, respectively, may, in Upper Canada, in their discretion, form themselves into a company or companies, under the provision of this act for the purpose of constructing in and along any public road or highway, allowance for road, or otherwise, any road or roads of the kind mentioned in the preamble of this act." The clause, thus far, seems to have had a two-fold object—to authorize the construction of the roads contemplated by the act, first, over public highways, and, secondly, under the expression "*or otherwise*," over private property; and in the absence of further restrictions, either course might, I presume, have been adopted. But then follows this proviso, "that no such company shall construct any such road or other such works aforesaid, through, over, along, or upon any private property, or property of the Crown, without having first obtained the permission of the owner or owners, occupier or occupiers thereof, or of the Crown, so to do *except as hereinafter provided*." And it is contended that public highways are within this proviso, as being the property of the Crown; and that they cannot therefore, be taken by the companies without the consent of the Governor in council.

We cannot agree in this construction of the act. The control of the public highways has been committed to these Municipal bodies throughout the Province (a). They have—without the reservation

(a) 12 Vic. ch. 81, sec. 31, subdivision 10.

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to the Crown of any control—been entrusted, with an almost unlimited power of dealing with existing roads and opening new ones. The general frame of the acts would lead to the conclusion that such control as the Legislature meant to retain over the incorporated companies would have been confided to the same bodies, and this is what seems to us to have been done—as I shall presently shew—by the third section of the act.

Judgment.

But the language of the proviso leads, we think, to the same conclusion. It limits the power of constructing roads over private property, or property of the Crown, "without having first obtained the permission of the owner or owners, or the occupier or occupiers thereof, or of the Crown, except as therein-after provided." Now, the object of this proviso appears to us to have been to limit the power of those companies, not in relation to highways—already dedicated to the public—but in relation to property the beneficial interest in which might be either in the Crown or in the subject. The expression used point to "property," as contradistinguished from highways rather than include them, and the exception to the proviso evinces, in our opinion, the justice of this inference. Companies are forbidden to construct roads on the property of the Crown or of private individuals, "except as thereafter provided." The provisions "thereinafter contained in the 5th and 10th sections." The 5th section enables incorporated companies to appropriate lands according to the provisions "thereinafter contained for acquiring the same." And the 10th section, after providing a mode of ascertaining the value of the land required, enables the company, upon tender of the amount, to take possession, *irrespective of the consent of the owner*. We find, therefore, upon examining the clause referred to, that the object of this proviso is to harmonize as far as possible the powers conferred by the act

with the rights of private property—to secure to proprietors a just compensation for their property, and then to enable companies to proceed irrespective of their consent. These regulations have no reference to highways. They show, we think, that the proviso was not intended to restrict the rights of these companies in relation to that species of property—an object, as it seems to us, otherwise provided for.

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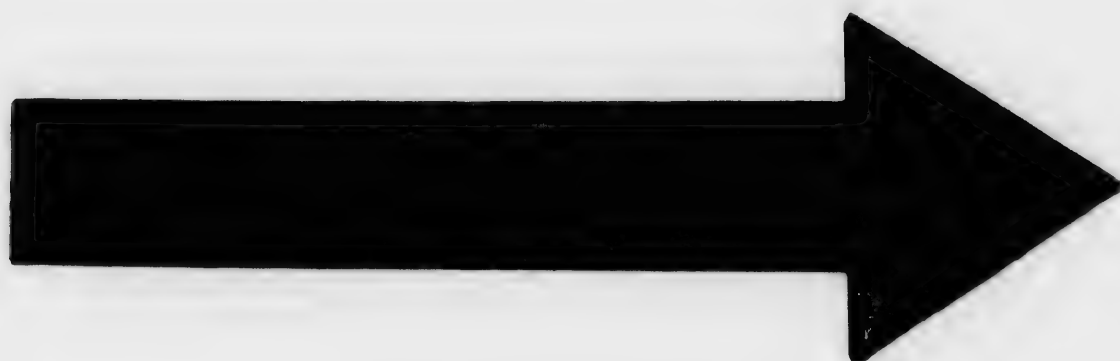
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Upon the third ground, however, we think the information is sustained. It was argued, on behalf of the defendants, that the authority of the municipality of the township of Nepean to prohibit this road had ceased, the work having been commenced before opposition made, and, consequently, before the enactment of the prohibitory by-law. That argument cannot, in our opinion, be sustained. Confining our attention to the second and third sections of the act, we should not be prepared to adopt that construction.

The second section, no doubt, gives to notice of Judgment. opposition, before the work has been commenced, a very important operation. Notice has, in that case, the effect of an interim injunction. It stays the work until the next meeting of the municipal council having jurisdiction. This effect may be lost by the failure to serve notice before the work has been commenced; but would the power to oppose be thereby absolutely forfeited? Would the power of prohibition conferred upon the municipal councils by the succeeding sections be thereby forfeited? We incline to think that it would not.

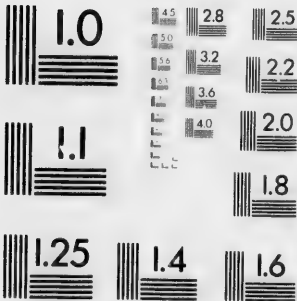
But it is unnecessary to dwell upon that point, because we are clearly of opinion that the construction contended for is excluded by other provisions in this and subsequent acts.

In the first place, consider the act itself. It enables any number of persons not less than five, "in



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1851. *their discretion,*" to form themselves into a company. There is no limit to this power. No opportunity to intervene is afforded to those interested. It follows, then, that the work in every instance may be commenced before any notice of opposition can, in the nature of things, be served, and the more objectionable the work, the more may this result be expected. Again: companies may be formed before the road has been located. The instrument to be registered is only required to specify the termini. But, the termini being settled, the road may be varied in any direction. Consequently, the work may be begun before it is even known who are entitled to object. Looking to these provisions, it is impossible, we think; to hold that the Legislature intended to limit the power of opposing in the way contended for. Such a construction would deprive the parties interested of all effective control. It is true that some provision has been made by a recent statute, but that does not seem to us to weaken the argument upon the act as originally passed.

Judgment

It was argued, however, that the municipal councils, under the third section, have power to prohibit merely; that in this case, they not only have not prohibited, but have expressly authorized this work, and that the by-law which merely refuses to grant permission to these defendants is therefore in effect a mere preference of one of two rival companies, unauthorized by the act, and therefore illegal.

This question, which is one of considerable difficulty, was very ably argued on both sides. We cannot say that our minds are now free from all doubt; but the best opinion we have been able to form is, that the permission of the municipality of the township of Nepean was necessary under the circumstances of this case, and that the proceedings of these defendants in relation to the highway in question—

that permission having been withheld—are unauthorised and illegal. 1851.

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Had this question turned upon the construction to be placed upon the Joint Stock Companies Act and the 31st section of the Municipal Corporation Act, there would have been considerable difficulty in reconciling those statutes. The former would seem to empower companies incorporated under its provisions, to proceed without reference to the permission of the municipalities, whilst the latter enables municipal corporations to make by-laws "for regulating the manner of granting to associated joint stock, road or bridge companies permission to proceed with any roads or bridges within the jurisdiction of such municipality, and the manner of afterwards ascertaining and declaring according to law the completion of the works undertaken by such companies respectively, so as to entitle such incorporated companies to levy tolls upon such works, and of all examinations, enquiries and investigations necessary for the proper, efficient and judicious exercise of such power."

Judgment.

It is unnecessary, however, that we should now consider the proper construction of these statutes, as originally framed, because, by an amendment passed in the next session of Parliament—13 and 14 Vic. ch. 64—the difficulty, so far at least as the present question is concerned, seems to us to be removed. By the latter statute, the clause in question has been amended by introducing after the words "joint stock road and bridge companies," the following clause—"to which opposition has been made in accordance with the provisions of the act passed in the present session of Parliament, &c." Now, that amendment would seem to have been introduced for the purpose of reconciling the previous statutes, and in our opinion, it has that effect. Where opposition has not

1851. been made, and where there is no special circumstance requiring permission, it is unnecessary. On the other hand, where opposition has been made, permission is indispensable.

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Judgment.

This conclusion appears to us to be in unison with the whole purview of those statutes, and to be necessary for effectuating their object. It was the intention of the Legislature, no doubt, to confer upon the municipal bodies very extensive powers in relation to the public highways. They are empowered to improve, divert, stop up existing ways, and to open new ones. Upon these bodies, in the first place, is devolved the duty—and perhaps it may be found the option too—of constructing such public improvements throughout the several localities. It is unnecessary, for our present purpose, to consider whether that option does in fact belong to these municipal bodies. But it may not be unimportant to observe that they are clearly empowered, under the 191st section, to contract with individuals for the construction of such works, and the proviso to that section enacts that contracts so entered into cannot be interfered with by any company formed under the Joint Stock Companies Act. If those with whom municipal bodies contract are so protected, it would seem difficult to deny to the municipalities themselves the option I have suggested. But, however that point may be determined, their powers are, certainly, very extensive; and authorize the liberal interpretation of the late act, which makes permission necessary where opposition has been made.

But, assuming the proceedings of these defendants to have been illegal, and assuming the information to be for that reason sustained, still a practical difficulty seems to us to exist, making an injunction at this time improper. Our judgment on the motion was postponed that we might have an opportunity of

consulting the statute passed in the last session for 1851. the amendment of the Joint Stock Companies Act. It is now stated that the portion of the road with respect to which this information was filed and this motion for an injunction made, has been completed in every respect and made a good macadamized road. The result is that there is no obstruction to be removed, and it is not expected, I presume, that we should now order the defendants to restore the road to its former condition. There would not seem to be any longer any reason for granting this application. Those who apply for an injunction are bound to shew not only a wrong to be redressed, but a mischief of that character requiring the exercise of the preventive jurisdiction (*a*). Here the nuisance complained of—and I understand nuisance to be the sole foundation of the information—has become a great public advantage. That which was a bad road has been converted into a good one. At law even, when the waste is of trifling value, a verdict has been directed to be entered for the defendants (*b*), and in this court the same doctrine prevails (*c*). We do not determine what order would have been proper had a bill been filed by the municipality of the township of Nepean to restrain these defendants within the limits prescribed by the act under which they were incorporated (*d*). Neither do we decide that an injunction may not become necessary. But there would not seem to be any practical injury to be redressed under present circumstances; and certainly it is not the necessary duty of this court to interfere by injunction under such circumstances. The mere infringement of a legal right, without injury, may be insufficient to warrant such interference (*e*). It may be proper, too, that the

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Judgment.

(*a*) Attorney-General v. Nichol, 16 Ves. 338; Winstanley v. Lee, 2 Swan, 333. (*b*) Harrow School v. Alderton, 2 Bos. & Pul. 36. (*c*) Barry v. Barry, 1 J. & W. 651. (*d*) Wilson v. Town Council of Port Hope, ante 370. (*e*) Att'y Gen. v. Eastern Counties Railway Co. 7 Jur. 807.

1851. defendants should have the opinion of a court of law
 Atty. Gen. upon the construction of the act, if they desire it (a).

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 The Nepean
 Road Co.

Judgment.

Upon the whole, if these parties cannot come to some arrangement, and an injunction is pressed for, it must be spoken to with reference to the altered circumstances.

O'LONE V. O'LONE.

Practice—Decree—Further directions.

October 31.
 December 2.

Where a decree, which reserved no further directions, directed that a sale or partition of the property in question should take place according as the Master might consider either course more for the interest of the parties, but contained no directions as to the conveyances or possession, or as to the execution of the deeds, and the Master reported in favor of a partition,—the Court, on motion, ordered the execution of conveyances and the delivery of the possession of the property, agreeably to the finding of the Master.

Statement.

In this case, the decree, on further directions, had referred it to the Master to consider whether a partition of the real estate in question in the cause would be advisable; and if he should be of that opinion, ordered that it should take place accordingly, but did not contain any specific directions for carrying it into effect. The Master reported in favour of a partition, and allotted different parts of the estate in severalty to the respective parties; but as, under the circumstances, he could proceed no further, the present application was made for an order directing the necessary conveyances to be executed and possession to be delivered, by the proper parties, of the respective allotments; the conveyances to be settled by the Master in case the parties should differ about the same; and that the title deeds of the different allot-

(a) *Dakin v. London and Northwest Railway Company*, 13 Jur. 579; *Barker v. North Staffordshire Railway Company*, 2 D & S. 55; *Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Railroad Company*, 1 Sim. N. S. 600.

ments should be delivered to the proper parties, or 1851.
attested copies with covenants the production of
the originals; or that the decree, on further directions, O'Lone
should be amended by introducing these directions v.
into it. O'Lone.

Mr. Mowat, for the motion, cited *Smith's Chancery Argument*.
Practice, vol. 2, pp. 191-2; *Daniel's Chancery Prac-*
tice, 1232; *Trevelyan v. Charter (a)*; *Bird v. Heath*
(b); *Seton on Decrees*, p. 184 in the note.

Mr. Turner contra, resisted the application, on
the ground that its object was a variation of the
decree, and that for this a re-hearing was necessary,
either in order to introduce the required directions
into the decree or to reserve further directions
whereby they could be obtained (c); or, if the omis-
sion was such as could be remedied without a re-
hearing, then he contended that the proper mode of
proceeding was by petition and not by motion. He
also contended that the decree, on further directions,
having been final, the cause was out of court and
no motion could be made in it.—*Daniel's C.P.* 1233.

Per Curiam.—Upon considering the motion made
in this cause, we are of opinion that the decree hav- Judgment.
ing directed a partition, the suit remained in court
until it was perfected; and that the decree, on further
directions, having determined all the matters in ques-
tion in the cause, which remained open, was final in
its nature; and that the directions which are required
being merely for the purpose of carrying into effect
what has been ordered by that decree, a re-hearing
is not necessary either for the purpose of adding the
required directions to it, or of introducing into it a
reservation of further directions; but the requisite
directions can be given on the present motion. We

(a) 9 Beav. 140. (b) 6 Hare, 236. (c) *Robertson v. Meyers*, ante
31.

1851. refrain from expressing any opinion as to whether the correction of a clerical error or omission in a decree can be obtained upon motion.

O'Loane
v.
O'Loane.

CLARK V. BURNHAM.

Pleading—Fraud.

October 28
December 2

The plaintiff had bought from the defendant 47 acres of land, paid for it and taken a conveyance of it, but subsequently discovered that 44 acres of it were covered with water; whereupon he filed a bill charging the defendant with fraud. No evidence of any fraud having been given, and it rather appearing that both parties had acted in ignorance of the nature of the property, the bill was dismissed, with costs, but without prejudice to any new bill being filed.

Statement.

The bill in this case, the nature of which is set forth in the judgment, was filed by *William Clarke* against the Hon. *Zaccheus Burnham*; and under the circumstances therein stated and set forth, prayed that the contract and sale therein mentioned might be decreed to be rescinded, and the defendant ordered to repay to plaintiff the sum of 47*l.* 10*s.**, together with his costs of this suit, upon the plaintiff surrendering to the defendant the indenture (executed by defendant to plaintiff) to be cancelled, and executing such release, assignment or conveyance as the court might order; or that it might be referred to the Master to enquire and state the quantity and value of the portion of the premises which is dry and available; and that the contract and sale might be ordered to be rescinded except as to such portion; and that defendant might be ordered to pay to the plaintiff the sum of 47*l.* 10*s.*, with plaintiff's costs, except such sum as the Master might report to be the value of the said portion of the premises; and for further relief.

The defendant having answered the bill, denying all the charges of fraud, the plaintiff had proceeded

* This is the prayer of the bill, but clearly, it ought to have been 70*l.* 10*s.*

to examine him *viva voce*, under the 50th order of 1851. May 1850; and the cause now coming on for hearing,

Clark
v.
Burnham.

Mr. *Brough*, for the plaintiff, contended the evidence was sufficient to establish legal fraud, as the defendant must be presumed and taken to have been aware of the property he was selling. Argument.

Mr. *Crickmore*, for the defendant.—All that can be said here is, that both parties have acted in ignorance of the real state of the property purported to have been sold; and if even upon a case properly framed in that view of the facts, relief could be afforded to the plaintiff, still, upon this bill, framed as it is solely with a view to relief on the ground of fraud, no decree in favor of the plaintiff can be made. The bill must be dismissed, and—the plaintiff having failed in proving any fraud on the part of the defendant—with costs; citing *Glascott v. Lang* (a), *Matthie v. Edwards* (b); *Curson v. Belworthy* (c); 1 *Sugden's Vendors and Purchasers*, p. 312.

The judgment of the court was now delivered by

THE CHANCELLOR.—The bill in this case states that the plaintiff entered into a contract with the defendant on the 29th of June 1850 for the purchase of broken lot number 23 in the 12th concession of the township of Cartwright in the county of Durham, containing 47 acres of land, at the rate of 1*l.* 10*s.* per acre, making the sum of 70*l.* 10*s.* The bill then states the payment of the purchase money and the execution of the conveyance, whereby the whole 47 acres were conveyed by the defendant to the plaintiff; that the plaintiff at that time had not seen the land, but afterwards visited it and discovered, as the fact was, that only three acres of it consisted of

December 2.

Judgment.

(a) 2 Ph. 310. (b) 11 Jurist, 761. (c) 11 Jurist, 915.

1851. dry land, and that the residue of it was land covered with water, being in fact part of the bed of the Lake Scugog. The bill states that the defendant, knowing this fact, fraudulently represented the property as consisting of 47 acres of dry land available for purposes of agriculture; and it prays that the contract may be wholly or partially rescinded on this ground.

Clark
v.
Burnham.

The answer denies the fraud imputed to the defendant by the bill, and it is wholly unsupported by the evidence; which, however, satisfactorily proves that of the 47 acres only 3 acres are dry land, and that the remainder is covered by the waters of Lake Scugog.

The defendant appears to have been as ignorant of the nature of the property as the plaintiff, and the case is no doubt one of mutual mistake. The bill, however, states no alternative case of this nature, but rests wholly on the imputed fraud.

Judgment.

The cases cited by the learned counsel for the defendant shew, that where a plaintiff states a case merely of fraud, which he wholly fails to establish, he cannot have relief on any minor ground to be collected from the facts of the case but not substantially relied upon; and we think that to grant relief to the plaintiff in this case, besides violating this rule, would be to proceed on a ground not only not stated but negatived by the bill, which in imputing fraud to the defendant excludes the case of mutual mistake, on which alone a decree in the plaintiff's favor could be founded. Under these circumstances, we think that the bill should be dismissed with costs; but inasmuch as some mistake may possibly have existed which may entitle the plaintiff to relief, such dismissal will be without prejudice to any other suit which the plaintiff may be advised to institute. In pursuing this course, we

are as far as possible from desiring to countenance the supposition that a person purchasing land, and paying his money and receiving a conveyance, without being at the trouble to inform himself concerning it, can, after the completion of his purchase, obtain relief by reason of any deficiency in the quantity, quality, or description of the land which forms the subject of his purchase; but there is some authority to shew that where the subject-matter of the contract does not in fact exist at the time of the purchase, relief may be afforded. Without even hazarding a conjecture whether the present is a case of this nature, or expressing any opinion whether, if it is, the plaintiff can have any relief, we think it right to reserve to him liberty to institute a suit for that purpose, should he, upon a due consideration of the facts of the case and of the law applicable to them, be advised to adopt that course.

1851.

Clark
Burnham.

DIXON v. MILLS.

Practice—37th Order of May 1850.

Where an absolute decree was pronounced under the 37th order of May 1850, and the plaintiff, through inadvertence, served the defendant with an office copy of the bill and a notice in the terms of the 40th of those orders, the defendant applied to answer the bill and set aside the decree; and it appeared by the affidavits filed in support of the application that the intended defence was a hard one and *strictissimi juris*, the Court refused the application.

This was a petition presented by the defendant *Nash*, against whom the bill had been taken *pro confesso* and a decree pronounced, to be admitted to answer the bill. He had appeared by his solicitor, and notice of the motion to take the bill *pro confesso* had been duly served on him. The decree, therefore, was absolute against him by the terms of the 37th order of May 1850; but nevertheless, after it was passed and entered, the plaintiff served him with an office copy of the bill and a notice, in terms of the 40th

Statement

1851. order of the same year, calling upon him to shew cause why the decree should not be made absolute against him within three weeks thereafter.

Dixon
v.
Mills.

The case stated by the bill was, that a mortgage having been made to the plaintiff by *Edward and Wilson Mills*, who were entitled to the property in question, as tenants in common, in fee, for securing 300*l.* and interest, the plaintiff afterwards obtained a release of the equity of redemption from the mortgagors, and entered into possession of, and made improvements upon, the property; but not until *Wilson Mills*, one of the mortgagors, had made two subsequent mortgages to the defendants *Nash* and *Emily Mills* respectively, of which the bill alleged that the plaintiff had no notice, when he obtained the release of the equity of redemption. The bill prayed that the two subsequent mortgages, which had been duly registered, should be declared void under the circumstances, and delivered up to be cancelled, as forming a cloud upon the plaintiff's title; or, if the court should be of opinion that they were valid and subsisting charges upon the property, then the bill prayed redemption or foreclosure in the usual way.

Statement.

The bill was taken *pro confesso* against both defendants, and the decree ordered redemption or foreclosure in terms of the prayer for alternative relief already mentioned.

The petition stated that the plaintiff had notice of the subsequent mortgages when he obtained the release of the equity of redemption; and insisted that the effect of the subsequent purchase of the property by the plaintiff, his security had become merged in the inheritance, and the subsequent mortgages had been accelerated and formed the first charges on the property. The petitioner also impeached the release of the equity of redemption as having been obtained by fraud practised upon *Wilson Mills*.

This individual made an affidavit in support of 1851.
 application, and deposed to the fraud alleged to
 have been practised upon him.

Dixon
 v.
 Milla.

It was contended by Mr. R. Cooper for the petitioner, that although the decree was originally absolute against his client, it was re-opened by the service upon him of the office copy and notice before mentioned; and that, under the circumstances, he was entitled to be let in to answer the bill, according to the prayer of his petition.

Argument.

Mr. McDonald appeared for the plaintiff, to resist the application.

The Chancellor and Mr. Vice-Chancellor Spragge were of opinion that the decree was not re-opened by the service of the office copy and notice, in terms of the 40th order; but if it had been, that an application of this nature, being an appeal to the discretion of the court, according to the tenor of the 43rd order of May, 1850, this was not a case in which the indulgence sought should be granted, the claim, which was thereby intended to enforce, being of a harsh nature and *strictissimi juris*, and not entitled to favor.

Judgment.

Mr. Vice-Chancellor Esten expressed no opinion as to whether the effect of serving the office copy of the decree and notice to make it absolute, was or not to re-open it; but, supposing it to be so, thought that this was not a proper case in which to exercise the discretionary power given by the 43rd order, inasmuch as the service of the office copy decree and notice referred to, was obviously a slip and done through inadvertence; and the legislature had declared its disfavor towards the doctrine of merger, which it was the object of the application to enforce, by totally abolishing it as unjust by an act of last session.

1851. *Per Curiam*—We think the petitioner has failed to make out a sufficient case to be let in to answer, supposing the decree to be absolute, even if it were competent to the court to make such an order; and we think it is not competent for the defendant *Nash* to set up a fraud practised upon *Wilson Mills*, he not complaining of it by bill filed for that purpose, although he has made an affidavit in support of the present application. At the same time, as the plaintiff's own proceedings have induced the present motion, we think it must be refused without costs.

Dixon
v.
Mills.

Motion to set aside the decree *pro confesso* refused without costs.

REES V. BECKETT.

Mortgage—Injunction.

December 9. A sale of the equity of redemption of certain mortgage property had been effected under a power of sale contained in a second mortgage deed; and, pending a suit in this court to set aside such sale, the first mortgagee, who was one of the purchasers, was proceeding at law to recover against the mortgagor upon the covenant contained in his mortgage deed; whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill, insisted upon the validity of the sale. From what had taken place in relation to the premises, it was doubtful whether the mortgage debt was not extinguished in equity as between the mortgagor and mortgagee, and the original cause being almost ripe for hearing, an injunction was granted to restrain the action at law until the hearing took place.

Statement.

The plaintiff had mortgaged certain lands to the defendant *Beckett* for securing a large sum of money and interest, amounting to between 2000*l.* and 3000*l.* He had also mortgaged the same lands to the defendants *Jacques & Hay*, with power of sale, for securing a sum of about 600*l.* and interest. *Jacques & Hay* exercised their power of sale with the consent of the defendant *Beckett*, on the understanding that this mortgage was to remain for some time outstanding, and offered the property for sale by auction, upon which occasion the defendant *Craig* became the

purchaser in trust for six persons, of whom the defendant *Beckett* was one for above 3000*l.*, which included the amount due to *Beckett* on his mortgage, the excess alone above that amount being paid by *Craig* to *Jacques & Hay*, who retained it in their hands. The purchase was made in contemplation of the formation of a marine railway and dry dock company, to be incorporated by act of parliament, of which the six persons above mentioned intended to become members, and to which the property was to be transferred, the six purchasers receiving the part of the purchase-money paid by them in the shape of stock; but if the formation of the company should be prevented, the purchase was to be for their benefit.

1851

Rees
v.
Beckett.

The defendants *Jacques & Hay* were also intended members of the projected company at the time that they offered the property for sale and effected its sale as above mentioned. The original bill had been filed by *Rees* to set aside the sale in question. The defendant *Beckett* had put in three answers, and the other defendants had also answered; and the cause was nearly ripe for hearing. *Beckett*, in his answers, insisted throughout upon the sale being a good and valid one, and that the property in the land in question was vested under it in the company, which had been incorporated by an act of parliament obtained for that purpose, and to which the purchase had been transferred in pursuance of the agreement before mentioned; but he had nevertheless filed a bill for the foreclosure of his mortgage to which he had made *Rees* a party, and had likewise since the commencement of the suit brought an action against *Rees* upon the covenant in his mortgage-deed for the recovery of the mortgage-money and interest, in which he had obtained judgment; and caused a writ of *fi. fa.* against the lands of *Rees* in the County of York, to be issued and delivered to the sheriff of that county to be executed, under which a sale had been

Statement.

1851. advertised to take place in a few days. Under these circumstances, the plaintiff *Rees* filed a supplemental bill, stating the commencement of the action, and praying that proceedings in it might be stayed until the decision of the question raised by the original bill respecting the validity of the sale. The present application was made for the injunction as prayed.

Rees
v.
Beckett.

Argument.

Mr. *Gwynne*, Q. C., for the plaintiff.

Mr. *Brough* for defendant *Beckett*.

Judgment.

The Court considering it very doubtful whether, supposing the sale to be upheld, the effect of *Beckett's* proceedings was not to extinguish the mortgage-debt as between him and *Rees*, and whether in this case it was revived upon the transfer of the property to the company, thought it reasonable that matters should be kept in their present state until the decision of the original cause, now nearly ripe for hearing; and accordingly granted the injunction upon the terms of the plaintiff, setting down the cause to be heard on the 23rd, if the defendants should be ready by that time.

A day was afterwards agreed upon between the parties for the hearing, and the injunction was issued accordingly.

COLEMAN V. SHERWOOD.

Ship Registry Act—8 Vic. ch. 5.

This Court cannot relieve against the omission of a mortgagee of a registered vessel, to have the proper endorsement of such mortgage made on the certificate of ownership.

June 27.
September 2.

In April 1847, *William Colcleugh*, the registered owner of the schooner "*James Coleman*," had mortgaged that vessel to the plaintiff. On the 8th of the

same month, this mortgage, which was in proper form, was duly produced to the collector at the proper port and entered in the books of registry of ownership; but no endorsement of the mortgage was ever made on the certificate of ownership. Afterwards, and on the 14th day of July 1848, *Colcleugh* executed a second mortgage on the same vessel in favor of *Henry Sherwood* and *Edward C. Jones* (the latter acting as trustee for his father, the Hon. *Jonas Jones*, who was then living); and on the 23rd of August 1848, *Colcleugh* executed another mortgage on the vessel in favor of the executors of Mr. *Jones*. These two mortgages were also duly registered, and the proper endorsements in reference thereto were made on the certificate of ownership.

Coleman
v.
Sherwood.

Colcleugh afterwards became bankrupt, and the present bill, which was filed against *Michael W. Brown*, his assignee, *Henry Sherwood*, *Edward C. Jones* and the executors of the Hon. Mr. *Jones* charged at considerable length that the second and third mortgagees had notice of the plaintiff's mortgage at and before the execution of the subsequent mortgages. The bill also alleged that the plaintiff had no title at law as against these subsequent mortgages, in consequence of no endorsement of his mortgage having been made on the certificate of ownership; and the prayer was, in substance, that the plaintiff might, notwithstanding this omission, be declared to have the first charge on the schooner; and that the proper directions might in that event be given for the sale of the vessel and the payment of the plaintiff's debt first out of the proceeds.

Statement.

All the answers, except *Brown's*, denied the notice charged. *Brown*, in his answer, set up that the subsequent mortgages were wholly void for want of a sufficient recital therein of the certificate of ownership. He also alleged that this had actually been

1851. decided in the Court of Queen's Bench in regard to one of them, being the mortgage to *Sherwood* and *Jones*; and he insisted that he was entitled to redeem the schooner by paying any balance that might be due to the plaintiff on the security thereof; and that the other defendants had no interest whatever in the schooner: and he claimed to have the bill dismissed as against him, with costs.

Coleman
V.
Sherwood.

Several witnesses were examined as to the charges of notice.

The cause now coming on to be heard, Mr. *McDonald*, for the plaintiff, said it would not be necessary to argue the different points raised by the pleadings and evidence, as the subsequent mortgages now submitted to a decree that the plaintiff's mortgage should be paid first, and then their mortgages according to their dates. The defendants have not produced or proved their mortgages, but all the defendants, except *Brown*, admit them; and *Brown* does not deny there being such instruments, but merely suggests by his answer that they are invalid. He cited *Cuzenove v. Clayton* (a).

Argument. Mr. *Vankoughnet*, Q. C., for the executors of Mr *Jones*,

Mr. *Phillpotts* for *Sherwood*,

Mr. *Strong* for *E. C. Jones*,

Submitted to a decree as prayed.

Mr. *Mowat* for *Brown*.—No decree whatever can be made, as the two subsequent mortgages were not produced or proved—*Marten v. Whichel* (b). This proof cannot be supplied, as the omission was man-

(a) 2 Mood & R. 552. (b) Cr. & Ph. 251

ifestly arranged to conceal the defects in the recitals therein of the certificate of ownership—*Sherwood v. Coleman* (a); *Watkins v. Corbett* (b).

1851.
Coleman
v.
Sherwood.

Independently of this objection, the relief prayed by the bill as to priorities could not have been granted—*Dixon v. Ewart* (c); *Follett v. Delaney* (d); *Campbell v. Thompson* (e); *Wyatt v. Barwell* (f).

Argument.

The only part of the prayer remaining is that which asks for a sale: this could have been effected by the mortgagee without a suit, and the bill should therefore be dismissed, with costs—*Wontner v. Wright* (g); *Cooke v. Brown* (h).

The judgment of the court was delivered by

Judgment.

ESTEN, V. C.*—This is a bill by a first mortgagee in point of time, of a vessel, against the second and third mortgagees and the assignee in bankruptcy, of the mortgagor. The second and third mortgagees had procured their respective mortgages to be endorsed on the certificate of registry before the first mortgage, and the object of the suit was to postpone the second and third mortgages to the first mortgage on the ground of notice.

This claim was wholly untenable. With whatever view the legislature introduced the stringent provisions of the English ship-registry acts for the purpose of regulating the internal trade of this province, they must receive the same construction as they have always received in England; and the Court of Queen's Bench for Upper Canada having upon this principle decided that the second mortgage—namely, that to *Sherwood* and *Jones*—was void at

(a) 6. U. C. Q. B. 614; Prov. Stat. 8 Vic. c. 5. (b) ib. 587. (c) 3 Mer. 322. (d) 12 Jur. 549, S. C. 2 De G. & S. 235, 317. (e) 2 Hare, 140. (f) 19 Ves. 439. (g) 2 S. 543. (h) 4 Y. & C. 227.

*The Chancellor was engaged in this cause while at the bar.

1851. law for want of a sufficient recital of the certificate of registry, we must also hold it to be void in equity. It does not appear whether the same defect exists in the third mortgage—namely, that to *E. M. & D. F. Jones*. If this point is questionable, inquiry must be directed for the purpose of determining it. Assuming, however, that the third mortgage is equally defective with the second—which I understood to be the case at the hearing—then I think that the bill should be dismissed, as to the second and third mortgagees, without costs.

Coleman
v.
Sherwood.

Judgment.

Whatever order we might think it right to make as to costs under other circumstances—notice having perhaps been proved against the executrix and executor, although not against *Sherwood* and *Jones*—yet these parties having, together with the plaintiff, attempted to make an arrangement at the hearing whereby these two void mortgages would have been thrown on the estate contrary to the law of the case, we think it right to award no costs as between the plaintiff and these defendants.

The plaintiff's mortgage appears to be perfectly valid as against the bankrupt, and of course against his assignee, who stands in his place. The certificate of registry is recited in it *totidem verbis*, and it was duly registered before the bankruptcy, as I understand. This is all that is requisite to give it validity as against the mortgagor. The assignee, indeed, made various objections to the suit at the hearing, although he made none in his answer. In fact, he offers to redeem in his answer, and therefore cannot now be heard to urge the objections which he attempted to raise at the hearing. One objection, however, he is entitled to insist upon—namely, that the plaintiff's deeds, upon which he founds his claim, are not proved. The defendant admits the execution and contents of these instruments, but

refers to them for greater certainty. This objection is not waived by the subsequent submission to redeem. Subject to any direction that may be necessary in consequence of this objection, I think the plaintiff should have a decree for payment of what is due to him out of the proceeds of the vessel (which has been sold by consent, and the purchase-money secured subject to the order of the court), with costs, as upon a suit against the assignee. The defendant *Sherwood* has not answered the bill, but appeared at the hearing by his counsel without objection from any party.

1851.

Coleman
v.
Sherwood.

Judgment.

Refer it to the Master to inquire whether the plaintiff's mortgage was registered before the bankruptcy (unless it shall be admitted that it was); also to inquire and state whether the mortgage to *E. M. and D. F. Jones* was defective for want of a sufficient recital of the certificate of registry (unless this fact shall also be admitted). Dismiss the bill as to *Sherwood* and *Jones* without costs, and also as to *E. M. and D. F. Jones*, if they shall admit that their mortgage was void. If it be admitted that the mortgage of the plaintiff was registered before the bankruptcy, refer it to the Master, &c.—usual decree—according to the circumstances.

Minutes.

It was afterwards admitted that the plaintiff's mortgage was registered before *Colcleugh's* bankruptcy; and the other defendants produced their mortgages, whereby the defective recitals appeared. The decree, as drawn up and passed, omitted therefore the contemplated references as to these matters.

December 19

DOREMUS V. KENNEDY.

Practice—Absent defendants' Act, 14 & 15 Vic. chap. 10.

Where a person is served under the statute 14 & 15 Victoria, chap. 10, as agent for an absent defendant, but is not such agent, he may in his own name move the Court to set aside such service. A visit of two months' duration to Upper Canada is such a residence as brings a defendant within the statute.

November 21
and
December 2.

The defendant *Kennedy* had been served under the provisions of the statute 14 & 15 Victoria, chap. 10, with a subpoena for the defendant *Parker*—

Statement.

1851. *Kennedy* being, as was supposed, an agent having charge of property of *Parker* in Upper Canada. No action had yet been taken by the plaintiff on the service so effected, and *Kennedy* now moved that the subpoena or the copy served upon him as such agent, or the service itself, might be set aside. In support of the motion, *Kennedy* filed an affidavit, stating that the defendant *Parker* "came to this province in the year 1847, and remained therein about the space of two months, travelling in, and visiting various parts of the said province." And the deponent further swore "that except on the occasion of the said visit, the said defendant *George Parker* had never been in the said province, and that he never was domiciled therein, or resided therein with the intention or view of making the said province his place of permanent abode."

Statement.

Argument. Mr. *Brough*, for defendant *Kennedy*, contended that *Parker* did not come within the provision of the first section of the statute, never having been resident within the province, further than travelling through it, as shewn in the affidavit. If a temporary residence, such as is here shewn, be sufficient to render a party liable to be proceeded against under the act, he submitted that the mere fact of a person crossing the frontier would in like manner have that effect.

Mr. *Mowat*, for the plaintiff, submitted that the facts stated in *Kennedy's* affidavit were sufficient to shew that *Parker* was liable to be proceeded against under the statute. If wrong, however, in this view, then he contended that the motion ought to have been made by *Parker*, and not by *Kennedy*. *Kinder v. Forbes* (a), is a case where process had been served on a person as agent of the defendant, and the motion to set it aside was made by the defendant. *Davidson v. The Marchioness of Hastings* (b) is to the same effect.

(a) 2 Beav. 503. (b) 2 Keen. 509.

He contended further, that a conditional appearance ought to have been entered on behalf of *Parker*, and referred to *Chesterfield v. Bond (a)*, *Price v. Webb (b)*, *Johnston v. Smallwood (c)*. 1851.
Doremus
v.
Kennedy.

The judgment of the Court was now delivered by December 2.

THE CHANCELLOR,—This motion is resisted on two grounds: first, because it is not competent to the agent to make such an application; secondly, because the affidavits shew that this is a proper case for substitutional service.

Considering the effect of the practice introduced by the statute; considering the consequences to the principal, and the position of embarrassment in which the agent may find himself placed; we think this sort of application on the part of the agent reasonable. Judgment.

With respect to the construction of the act, as applied to the practice of this court, difficulties arise upon almost every section, to some of which we adverted in the case of *Canniffe v. Taylor (d)*. The first clause, upon which the question now before us arises, provides "that proceedings may be commenced in any action or suit, in any of the superior courts of law or equity in Upper Canada, against any person *who having resided* in Upper Canada is absent therefrom, having contracted debts or liabilities while in Upper Canada, or having real property therein, in the same manner and by the same process as if such person was a *resident inhabitant therein*."

Now, everything provided by that clause might have been done according to the settled practice of this Court, without reference to the question whether the defendant had or had not resided in the province, and without considering whether he had contracted debts, or possessed real or personal property therein.

(a) 2 Beav. 263. (b) 2 Hare, 511. (c) 2 Dowl. 588. (d) Ante, 617.

1851.

Doremus
v.
Kennedy.

But then, the second section constitutes a species of agency—an agency *in invitum*, as it were—hitherto unknown; and it therefore becomes necessary, for the purpose of determining whether substitutional service has been authorised in this particular case, to consider whether the principal comes within the class designated in the first clause.

Judgment.

The object with which this particular qualification as to residence was introduced, is not perhaps very apparent. But with whatever object it may have been introduced, we see no ground upon which the present defendant can be exempted. The legislature has not pointed out the nature or extent of the residence necessary to authorise substitutional service; permanent residence cannot have been intended, because the expression is used in contra-distinction to the term *resident* inhabitant in the end of the clause.

Questions of difficulty are not unlikely to arise upon the construction of this clause; but, in the case now before us, we know of no ground upon which to exclude a person [who was confessedly within the province for a period of two months.

WHITE v. BEASLEY.

Mortgage—Practice—Parties.

October 21, In suits by judgment creditors for the sale of the debtor's property, the
and debtor is entitled like a mortgagor to six months to redeem before the
December 2 sale takes place. The rule prescribed by the statute 43 George III.
chapter I, is not applicable to the practice of this court.

To a bill by an incumbrancer for the sale of the property, all other incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the Master's office, and the proceeds of the sale will be applied to pay off all the incumbrances according to their priorities.

Argument.

Mr. Mowat, for plaintiff.

Mr. Morphy, for defendant.

The following cases were cited by counsel—

Carlton v. Farlar (a); 2 *Spence*, 781-91-95; *Seton* 1851.
on Decrees, 84; *Delabere v. Norwood* (b); *Richards*
v. Cooper (c); *Slade v. Rigg* (d); *Rose v. Page* (e);
Odell v. Graydon (f); *Story's* Eq. Pleading, secs.
148, 193, 230; *Calvert* on parties, 128; *Cocker v. Lord*
Egmont (g).

White
v.
Beasley.

THE CHANCELLOR.—This bill is filed by a regis-
tered judgment creditor, under the statute 13 and 14
Victoria, chapter 63. Upon the motion for a reference,
two points were raised of considerable importance to
the general practice, both as to the form of the decree
and the frame of the suit.

December 2.

Judgment.

With respect to the first, it was contended that this
court had not jurisdiction to decree the sale of land
under a judgment, within the period of twelve months,
prescribed by the statute 43 George III. ch. 1.

We are of opinion that the rule prescribed by that
statute has no application to the practice of this court.
The statute under which the bill has been filed makes
a registered judgment as effectual, in this court, as
if the debtor had agreed by writing under his hand
to charge his lands, and provides that the judgment
creditor shall have the same remedies. Now the
doubt entertained at present in England is, whether
the judgment creditor is not entitled to an immediate
sale. The practice of extending indefinitely the time
for payment of the mortgage debt, without reference
to, or rather in defiance of the contract of the parties,
has been repeatedly condemned as unjust to mortga-
gees. The tendency of modern judicial opinion is
opposed to that practice, and the general feeling of
its injustice has resulted in the power of sale now
usually introduced into such conveyances. These
considerations point rather to the expediency of

(a) 8 Beav. 525. (b) 3 Swans. 144 note. (c) 5 Beav. 304. (d) 3
Hare, 38. (e) 2 Sim. 471. (f) 6 B. P. C. 67. (g) 6 Sim. 316.

1851.

White
v.
Bosaley.

laying down, in relation to this new class of cases, a rule more strict than that which prevails in relation to mortgages. But, upon the whole, we think that the Legislature did not intend to place judgment creditors in a position more favorable than mortgagees, and that six months must therefore be allowed, in accordance with the provisions of the 78th of the orders of May 1850.

Judgment.

With respect to the frame of this suit, it was argued not only that judgment creditors—whether prior or subsequent to that decreed—are not necessary parties; but further, that the decree should not provide for the payment of those incumbrances, but should authorize a sale subject to them. It was contended that both propositions were in accordance with established practice. But, although that were found to be otherwise, it was argued, that the inconvenience of making all judgment creditors parties would be so great, and the loss attendant upon cash sales so considerable, as to warrant the court in laying down a new rule in relation to this class of cases.

We are of opinion, as a general rule, that, according to the settled practice, all judgment creditors, whether prior or subsequent, should be parties, and that the decree should provide for their payment according to priority; and the practice, so understood, appears to us to be conducive to the ends of justice.

The Irish cases upon the subject are more numerous than those furnished by the English courts, owing probably to the habit in that country of using judgment as securities; and the practice which prevails there of proceeding by sale instead of foreclosure, renders these decisions more strictly analogous to the question now before us.

It is remarkable however, that the argument advanced here is precisely the reverse of that maintained,

until lately at least, in Ireland. Here, the necessity of making subsequent judgment creditors parties was not denied, but it was contended that no such necessity exists with respect to older incumbrancers. Now in *Steele v. Philips* (a), the Master of the Rolls assumed that puisne judgment creditors were not necessary parties, but older incumbrancers were. And in the subsequent case of *Johns v. French* (b), the same learned judge demonstrated the correctness of his opinion in *Steele v. Philips*, although the decree had been there reversed by the Lord Chancellor, with great force and clearness of reason.

1851.

White
v.
Hensley

The question in those cases was not, in form, one of parties, but it was so, in effect, and it was so treated by Lord *Manners* upon the appeal. He says, "If I am to decide that those judgment creditors are not bound by the decree, it is in effect to rule that all those judgment creditors ought to be parties to this suit." And again: "As to actual notice by the purchaser of an outstanding judgment—unless it amounts to notice of a material party, it amounts to nothing."

Judgment.

The decree in *Steele v. Philips* was reversed by Lord *Manners*, upon appeal. His lordship's reasoning was based upon this proposition, admitted by the Master of the Rolls, that puisne judgment creditors are not necessary parties; and, assuming the premises to be sound, the conclusion was, I think, undeniable; but subsequent investigation has shewn that the proposition thus assumed cannot be maintained.

Rolleston v. Morton (c) must be considered as a case of very high authority. It was decided by Sir *Edward Sugden*, then Lord Chancellor of Ireland, assisted by both the Lord Chief Justice of the

(a) 1 Hogan, 49. (b) ib. 450. (c) 1 D. & W. 171.

1851. Queen's Bench, who had attained to great eminence at the equity bar, and the Master of the Rolls, a judge of considerable experience. All those learned persons concurred in the decree pronounced. There a puisne judgment creditor who had been made a party, objected and claimed that the bill should be dismissed against him with costs. The decree however declared that he was a necessary party, thus disaffirming the proposition admitted by the Master of the Rolls and assumed by the Lord Chancellor in *Steele v. Philips*.

White
v.
Beasley.

Judgment.

It is true, as was argued, that this only determines the necessity of having subsequent judgment creditors before the court—a proposition not contested by the learned counsel for the plaintiff; but, apart from the fact that the general reasoning throughout the judgment applies with equal force to prior judgment creditors, the Chancellor, in express terms, approves of the decree of the Master of the Rolls in *Steele v. Philips*, which directly determines the question now before us. He says, "And though his judgment was afterwards reversed by Lord *Manners*, all subsequent judges have thought that his Lordship's reversal did not rest upon sound principles, and I concur in the opinion of the Master of the Rolls."

But the proposition is repeatedly and distinctly affirmed throughout the judgments to which I have adverted. In *Johns v. French*, the Master of the Rolls observes, "Such prior judgment creditors, if made parties to the original bill, could not, I conceive, on any ground demur; and it sometimes occurs that such prior judgment creditors are made parties to the original bill by a subsequent mortgagee, but it frequently occurs that they are not made parties originally, in order to avoid expense and abatement in the suit; and yet if it afterwards appears in making out the title that there are prior judgment creditors who

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v.
Beasley

will not come into the office under the advertisement for creditors. I apprehend that the proper remedy and course is to make them parties by supplemental bill." In *Rolleston v. Morton* Sir Edward Sugden says, "However, so far as I am acquainted with the practice in England, it would in strictness be necessary to make all judgment creditors parties." But the language of the Chief Justice in the same case is peculiarly pertinent because applicable to proceedings upon a statute similar to that under which the present plaintiff is proceeding. He says, "In the first place, it is conceded, and indeed it could not be the subject of a moment's controversy, that if there be a specific lien upon property which is intended to be sold under a decree, whether the specific lien be prior or subsequent to the demand of the person who files his bill, the specific incumbrancer must be made a party in the cause, and it is not that he may, but that he must be made a party; and otherwise, if the objection appear on the face of the pleading, the bill would be demurrable." judgment.

It will have been perceived that all the cases to which reference has been made, negative the notion that it is the practice of this court to sell an estate subject to judgments. The whole reasoning of the Master of the Rolls, as well as of the Lord Chancellor in *Steele v. Philips*, is based upon the contrary practice. The Master of the Rolls considered that the purchaser, in the case before him, would be liable to prior judgments, and therefore, he argued that the prior judgment creditors were necessary parties, to avoid so inequitable a consequence. Lord *Manners*, on the other hand, argued that if the land was subject to prior judgments, then those prior judgment creditors would be necessary parties; and, as he held it to be clear that they were not necessary parties, he concluded that the land was not so subject in the hands of the purchaser. In *Rolleston v. Mor-*

1851. *ton*, the Chancellor observed, "but he is left to his remedy, it is said; *that remedy is nothing, for the court would protect a purchaser against any proceedings taken by such a creditor, and unless it was prepared to do so, it would by its decree have made a sale disgraceful to a court of justice.*"

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Lastly: In *Neate v. Duke of Marlborough (a)*, Lord Cottenham said; "So again, after the debtor is dead, if under any circumstances the estate is to be sold, the court pays off the judgment creditor, because it cannot otherwise make a title to the estate, *and the court never sells the interest of a debtor subject to an elegit creditor.*"

Upon these authorities we are of opinion that the settled practice of the court is, on both points, at variance with the positions advanced by the learned counsel for the plaintiff.

Judgment.

It is argued however, that the inconveniences of this practice would be so great as to warrant us in laying down a new rule in relation to this class of cases. We are of opinion however, that the balance of convenience is greatly in favor of the established course.

It is to be observed, in the first place, that the argument *ab inconvenienti* has been almost, if not altogether obviated by the recent orders of this court. Under the 4th and 5th of the orders of May 1850, judgment creditors may now be made parties in the Master's office, and the 14th order of May 1850 enables plaintiffs to remedy by motion that which could only have been accomplished previously by supplemental bill.

Then consider the inconvenience which would follow from adopting the practice contended for.

(a) 3 M. & C. 416.

How is a sale possible without having the judgment creditors parties, or at least, without having an account taken of their incumbrances? Who would purchase an estate subject to incumbrances unascertained, both as to number and amount—subject to as many bills in Chancery as there may happen to be judgment creditors? I do not say that such a sale would be impossible, because I believe that something of the sort is attempted under common law process, although we have not been informed as to the course pursued by the sheriff under such circumstances. What does he sell, the estate discharged from judgments, or subject to them? Whom does he pay, the creditor whose judgment is first registered, or who may have first placed a writ in his hands? However the matter may be managed at law, it must be obvious, I think, that an estate so sold would be sold under the utmost possible disadvantage. Such a sale would be unjust, both to the debtor and the creditor, and could only result in a collusive purchase by the debtor himself, or in the acquisition of the estate by an oppressive creditor.

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v
Beasley.

Judgment.

But, assuming that difficulty overcome, others of a no less formidable character are presented at every step. Would not each judgment creditor have a right to file a bill during the progress of such a suit? Would a sale be possible pending such proceedings? Suppose no such bill to have been filed during the pendency of the suit, would not the purchaser be liable to as many suits as there are judgment creditors; and, as a necessary consequence, would not the estate be burthened in numerous instances with enormous costs? Why should that be done in many suits at great expense, which might be disposed of more conveniently in a single proceeding? Again: have not all the judgment creditors a right to be present when the account is taken upon which the sale is decreed? Is it not just that those most deeply

1851. interested should be present to watch that account ?
The judgment may have been obtained collusively.
Would there be any safety in ordering a sale in the
absence of all those interested to contest the amount
really due ?

White
v.
Beasley.

Judgment.

Upon the whole, having considered the subject a good deal as one of great practical importance, we are of opinion that the settled practice requires all judgment creditors to be brought before the court in the Master's office, and that the ends of justice will be best attained by adhering to that practice, and we think that the decree must provide for payment of the incumbrances according to priority.

FERRIER V. KERR.

Injunction—Waste.

December 2. A purchaser having entered into possession under his contract, and failing to perform his agreement and to meet his payments, after the time appointed for that purpose had arrived, was restrained from committing waste or removing timber already cut down on the premises in question.

Statement.

This was an application for a special injunction under the following circumstances, as stated in the bill and affidavit filed in support of the application. The plaintiff had, in June last, contracted in writing with the defendant for the sale to him of the land in question in this cause, consisting of 50 acres in the township of Oneida, for 200*l.*, payable by instalments, with interest, in the following manner—namely, 50*l.* on the 1st of November then next ensuing, and the remainder by five annual instalments of 30*l.* each, with interest, on the 1st of November in every year, until the whole purchase money should be paid. The defendant was to erect a fence on part of the property, of which the plaintiff was to bear half the expense, and the plaintiff was to give the defendant a bond conditioned for the due execution of a deed, on payment of the purchase

money and interest. The defendant, who had borrowed the written agreement from the plaintiff for some particular purpose, had not returned it, and the plaintiff was unable in consequence to state it with more particularity than is above mentioned. The fence had not been erected by the defendant, in pursuance of the agreement, although the plaintiff had always been willing to bear his share of the expense attending it; and on the 1st of November, the plaintiff had called upon him, accompanied by two friends, and demanded payment of the first instalment of the purchase money of 50*l.* which fell due on that day, offering to execute a bond according to the agreement, but he had refused and still refused to pay it; he had, however, entered into possession of the property at the time of making the agreement, and had remained in possession of it ever since, and had during all that time been felling timber and manufacturing it into staves and cordwood, and disposing of it for his own benefit; and a large quantity of timber thus manufactured was then on the premises. The plaintiff had frequently requested the defendant to desist from committing waste on the property, but he had refused. Although the application was made this day, the bill had been filed at Hamilton, and the affidavit sworn on the 29th November.

The bill, after stating the foregoing facts, prayed that the contract might be specifically performed within a time to be appointed by the Court for that purpose; and in default, might be rescinded, and might be delivered up to be cancelled. The bill and affidavit stated the apprehension of the plaintiff that the defendant, who was in poor circumstances, would be unable to meet his payments as they fell due under the contract.

The Court intimated the opinion, that a purchaser having entered into possession under his contract,

1851.

Ferrier
v.
Kerr.

Statement;

Judgment.

1851. and failing to perform his agreement and to meet his payments, after the times appointed for that purpose had arrived, should be restrained from committing waste, and that the restriction might, perhaps, with propriety under such circumstances, be extended to timber already felled under the agreement, and remaining undisposed of; but considered that the plaintiff having, under the circumstances of the defendant neglecting to erect the fence pursuant to the agreement, and to pay the first instalment on the day that it became due, waited the not unreasonable time of twenty-eight days to afford the defendant an opportunity of fulfilling his agreement, could not be damnnified by being required to give notice of his application for an injunction to stay waste, and that it was inexpedient under such circumstances to interfere *ex parte*. The application was therefore refused for the present, but leave was given to the plaintiff to renew it, upon notice to the defendant.

December 9. Mr. *Morphy* renewed his application, and produced an affidavit of service of notice of motion. No one appearing for the defendant, the injunction was ordered to issue restraining the defendant from felling timber, or disposing of that already felled.

CHRISTIE V. SAUNDERS.

Injunction—Tenants in Common.

No injunction will be granted between tenants in common, except in cases of actual destruction; (*Semble*), but where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so, it being considered that his rights of ownership on his own moiety were to be exercised in subordination to his duty as trustee of the other moiety.

Statement. From the bill in this cause it appeared that one *John Christie* had died, having made his will in manner required by law for devises of freehold estates, under which the plaintiff *Elizabeth Christie*

was entitled to a life estate in his lands, and an absolute interest in part of his personal estate. The legal estate in the lands appeared to be vested in the trustees, executors and executrix named in the will, who were the widow (*Elizabeth Christie*) herself, the defendant *Saunders*, and another defendant *Clements*. The beneficial interest in remainder in the lands, and in the residue of the personal property, was disposed of amongst other defendants, who were a daughter and nieces of the testator. The husbands of such of them as were married were also defendants, and an infant daughter of the plaintiff *Elizabeth Christie*, and of the testator, was a co-plaintiff in the original bill. The statement in the bill was, that differences and disagreements had arisen amongst the trustees, which had prevented the estate from being administered; that *Clements* had resided in the Island of Jamaica; and that *Saunders* was in possession of the real estate of the testator, upon which he was committing waste, and applying the proceeds to his own use.

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Christie
v.
Saunders.

Statement.

The bill represented the real estate to consist of a saw-mill and 70 acres of land; a lot of 200 acres of land adjoining, being lot 24 in the fifth concession of Bayham; and another lot of 200 acres, being lot 20 in the fourth concession of the same township. The prayer was for an administration of the estate, and an injunction to restrain the defendant *Saunders* from committing waste. Notice of motion was given for an injunction to restrain the defendant *Saunders*, his agents, servants and workmen, from cutting timber on lot 20 in the fourth concession of Bayham. The application was supported by affidavits evidencing the waste which it was sought to restrain. It was mentioned in the notice that the bill and answer in a suit already instituted and then pending by the defendant *Saunders* against the other parties to the present suit, in which he claimed to be a creditor of

1851 } the estate, and sought the satisfaction of his own debt
Christie } and the other debts of the testator, would be read in
v. } support of the motion.
Saunders.

Statement. Upon looking into the pleadings in this suit, it appeared that lot 20 had been purchased by the testator of the Canada Company, on behalf of himself and the defendant *Saunders*, and that he had paid the whole of the purchase money to the Canada Company, but had debited the defendant *Saunders* in account with a moiety of it. A running account appeared to have subsisted between the defendant *Saunders* and the testator. After the motion had been made, but before any decision upon it, on its being mentioned in court it appeared that the bill had been amended by making the infant plaintiff a co-defendant, and striking out her name as a plaintiff.

Argument. Mr. *R. Cooper* appeared for the plaintiff, and Mr. *Turner* for the defendant *Saunders*; the other defendants were not parties to the application.

Mr. *Turner* objected that the defendant *Saunders*, being a tenant in common in equity of the lot in question, was entitled to cut timber upon it, and that an injunction could not be granted to restrain him from doing so; and also, that the amendment of the bill since the motion was made had put an end to it. Mr. *Cooper* relied upon the cases of *Twort v. Twort* (a); *Hole v. Thomas* (b); *Norway v. Rowe* (c); and *Story's Eq. Jur.* vol. 2, sec. 916.

The trustees appeared to have powers of management and disposition under the will, which might justify the cutting of timber on proper occasions, and for the benefit of the estate. The proceedings of the defendant *Saunders*, however, appeared to be for his own individual advantage.

(a) 16 Ves. 128. (b) 7 Ves. 589. (c) 19 Ves. 143.

Per Curiam.—We have looked into the authorities cited on the present application, and are of opinion that the case of *Twort v. Twort*—in which Lord Eldon granted an injunction to restrain a tenant in common, occupying the entirety under an agreement with his co-tenant, creating a tenancy as to his moiety, from ploughing ancient meadow—warrants us in granting this motion, as we consider the cutting of timber by *Saunders* for his own use a breach of his trust as to the moiety of the lot which belonged to the testator; and that his powers of disposition and rights of ownership over his own moiety are to be exercised in subordination to his duty as trustee of the other moiety; and we do not deem the absence of the other parties to the suit, who are beneficially interested in the property, an objection, the application being clearly for their benefit. We grant the motion, however, without costs to either party.

1851.

Christie
v.
Saunders.

Judgment.

Injunction to issue, restraining the defendant *Saunders*, his tenants, workmen and agents, from cutting timber on the moiety of lot number twenty in the fourth concession of the township of Bayham, which formed part of the testator's estate.

The effect of granting this application would be to prevent *Saunders* from cutting timber on any part of the lot.

GARSIDE V. KING.

Crown lands—Voluntary assignment.

A vendee of the crown transferred his interest by way of mortgage to a person, who took *bona fide*. Afterwards the vendee made a second assignment for a nominal consideration, of 200*l.*, but no money did in fact pass, the consideration mentioned being intended to cover the amount which the assignee would be obliged to pay to the government for the balance due on the contract with their vendee. On a bill filed by the mortgagee to set the second conveyance aside—*Held*, that as against the plaintiff the second deed was voluntary; and even if it had been registered under the statute regulating the sale of crown lands, it would not have prevailed against the prior incumbrance of the plaintiff.

September 6
October 31.

The bill in this cause was filed by *Frederick*

1 R.

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Garside
v.
King.

Statement.

Garside of the township of Hamilton in the county of Northumberland, against *William King* and *Andrew King* his son, of the same place, *John Tucker Williams* and the *Attorney General*, and as amended, set forth that *William King* was entitled to the fee simple in possession of lot No. 15 in the 7th concession of the said township, under a contract of sale from the Commissioner of Crown Lands, whereby he was entitled to receive a patent for the said lot upon payment of the balance of the purchase money; and that *William King* being so entitled, and being a contractor with the Cobourg and Rice Lake Plank Road and Ferry Company for the formation and completion of certain work on this road, and the plaintiff being one of *King's* sureties for the due performance of his contract with the company, and having also made advances of money for him towards the completion of the work, and being required by *King* to make further advances, he *King*, at the request of the plaintiff and in order to secure him from loss as well in respect of such advances made and to be made, as of such suretyship, mortgaged his interest in the said lot of land, and the plaintiff was to be at liberty to pay the balance of the purchase money and take out the patent in his own name and hold the land in security.

The instrument by which this charge was created was by deed poll dated the 15th day of May 1847, absolute in form, and was set out at length in the bill. The plaintiff gave a bond to convey to *William King*, on payment of plaintiff's claim.

The bill then stated that the plaintiff, through his agent, applied, in the month of November following, to the local district agent of the crown lands department resident in the county, to have the assignment from *King* registered pursuant to the statute; but which the agent refused to do until all arrears due to government were paid.

The bill further alleged, that *King* had afterwards, and in October 1849, wrongfully executed an assignment of his whole interest in the said land to defendant *Williams* for a nominal consideration of 200*l.*, but in fact without any consideration, and merely to enable *Williams* to obtain the patent deed for the land in his own name, upon some understanding between *King* and *Williams*, for upon the same day *Williams* executed a bond in favor of *Andrew King* to convey the land to him upon payment of 225*l.*, *William King* in such transaction professing to act as agent of *Andrew King*, he himself never having seen or spoken to *Williams* on the subject; that plaintiff was entirely ignorant of all these dealings between *Williams* and *King* until the month of December 1849; when on applying to the local agent to ascertain the amount due to government, he was informed of the sale to *Williams*. The prayer of the bill was, that a patent from the crown might be issued to the plaintiff, and for an account.

1851.

Garalde
v.
King.

Statement

It appeared that as soon as *Williams* obtained his assignment from *King*, he paid up all the purchase money due to government, and sent his papers to the crown lands office for the purpose of being registered pursuant to the statute; and they would have been duly registered had it not been that the seat of government at that time was just being removed from Montreal to Toronto. Immediately upon plaintiff's learning the fact of the transfer to *Williams*, notice was given to the crown lands office of plaintiff's claim, in consequence of which no registration of the deed to *Williams* had ever taken place.

This statement, together with the facts set forth in the judgment, will clearly shew the nature of the case.

On the cause coming up for argument, Mr. *D. E. Boulton* of Cobourg and Mr. *Crickmore*, for the plaintiff, Argument.

1851. contended that the plaintiff was entitled to have the patent deed issued in his name, free from any lien or charge of *Williams*, whose conveyance, if not void for fraud, was so tainted with usury as to render it of no value as against a *bona fide* purchaser; also, that it was voluntary and therefore void as against plaintiff.

Argument. Mr. *Brough* for *Williams*.—The plaintiff has made no case for relief on the ground of usury, but on the ground of fraud alone; failing in proving that case, he contended *Williams* was entitled to a decree directing the patent to issue in his name.

Mr. *R. Cooper* for the defendant *King*. The Attorney General did not appear.

October 31st The judgment of the court was now delivered by

Judgment. THE CHANCELLOR.—In the year 1833, the defendant *Wm. King* acquired an equitable title to 200 acres of land in the township of Hamilton—being the premises in question in this cause—under a contract for purchase, entered into with the Commissioner of Crown Lands in that year. On the 15th of May 1847, the legal estate being still in the crown and the purchase money unpaid, *Wm. King* assigned all his interest in the premises to the plaintiff, absolutely, in consideration of 500*l.*, as the transaction is stated in the assignments, but really to secure a debt then due and future advances, as appears by a bond contemporaneously executed by the plaintiff. This assignment has not been registered, the Commissioner of Crown Lands having refused to recognize it until the purchase money should have been paid, a step which the plaintiff was not prepared to take.

On the 15th of October in the year 1849, *Wm. King* conveyed all his interest in the premises in question to the defendant *Williams*. The consideration stated in the instrument is 200*l.* In fact

nothing was paid to the assignor; but the assignee, *Williams*, undertook to discharge the balance due upon the contract of 1833, which, with interest, amounted to 181*l.* 7*s.* 1*d.*

1851.

Garalde
v.
King.

By agreement contemporaneously with the last assignment, *Williams* undertook to convey the premises in question to the defendant *Andrew King*, in consideration of 225*l.*, payable in five years. A bond to that effect, from *Williams* to *Andrew King*, has been put in evidence. It bears date the 15th of October, but is said to have been executed on or after the 20th of that month. The subscribing witness however, has not been examined.

In pursuance of the arrangement between the parties, *Williams*, a few days after the execution of the assignment—on the 20th day of October—paid the amount due on the foot of the original contract to the district agent appointed by the crown lands department, who shortly afterwards transmitted the assignment to the commissioner for registration, pursuant to the statute 4 & 5 Victoria, chapter 100.

Judgment.

The plaintiff having been informed of these proceedings, caused a notice of the prior assignment to himself to be served upon the Commissioner of Crown Lands on the 22nd of the following month of December; and, in consequence of that notice, the commissioner refused to permit the registration of the instrument until the rights of the parties should have been ascertained.

The original bill impugned the transactions between *Williams* and *King* as voluntary, entered into with full notice of the plaintiff's assignment, and for the fraudulent purpose of defeating his interest thereunder. The registration of the second assignment seems to have been assumed, and relief to have

1851. been asked, notwithstanding the legal advantage thereby acquired, on the ground of fraud.

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v.
King.

The defendants *Wm. King* and *Williams* answered the original bill. *Williams* negatives the fraudulent intent attributed to him; he denies notice of the plaintiff's interest, and claims as a *bona fide* purchaser for value. *Wm. King* denies almost every allegation in the bill. He denies that he ever executed the instruments relied upon by the plaintiff, or instruments of the like import. He says that the object of the assignment of May 1847, was to procure the means necessary to pay the balance due on the original contract; and that he felt himself at liberty to sell to *Williams* in consequence of the failure of the plaintiff to fulfil his engagement in that respect. And he asserts that he never had possession of the original documents, which were deposited with *D. E. Boulton*, Esq., at the time of the contract, as the agent of both parties.

Judgment

Upon the coming in of those answers the bill was amended. The amended bill charges that the defendants pretend that *Williams* is a purchaser for value without notice, of *King's* entire interest. It charges, on the contrary, that the transaction between *Williams* and *King* was a mere loan of the amount due to the government upon the contract of 1833; and that the instruments were drawn in their present form to evade the statutes against usury; and prays that the plaintiff may be permitted to redeem *Williams* on payment of the amount advanced by him.

This allegation has not been denied by any of the defendants.

It was argued, at the hearing, that *William's* title should prevail, on two grounds: First, because of

the plaintiff's neglect to give notice of his assignment. Secondly, under the 19th section of the 4th & 5th Victoria, chapter 100, it was argued that the case must be dealt with as if the assignment to *Williams* had been actually registered, he having done everything necessary on his part to secure registration, and having been prevented from accomplishing that object by the unjustifiable refusal of the commissioner to register.

1851.

Garside
v.
King.

This case does not seem to us to call for a decision upon any of these points; because, assuming these propositions to be tenable, we are of opinion that the plaintiff is, notwithstanding, entitled to redeem.

But, before proceeding to explain the grounds upon which we have arrived at that conclusion, it is proper to remark that we do not, as at present advised, accede to the arguments of the learned counsel for the defendant. It has been decided—and, as it seems to us, correctly—that the principle upon which *Dearle v. Hall (a)* and the other cases of that class proceeded, has no application to the assignment of equitable interests in land; and that the position of the parties, consequently, would not be altered by the remissness of the one or the activity of the other, in regard to notice.

With respect to the questions upon the statute 4 & 5 Victoria, chapter 100, we are inclined to think that *Williams* must be regarded as a mere volunteer. *Wm. King's* equitable interest was subject to the vendor's lien for the purchase money. All that he either could, or in fact did dispose of, was his interest in the land, subject to that lien. But for that interest *Williams* paid nothing. He discharged the amount for which the vendor had a lien; but for the

1851. interest of *King* in the estate beyond that lien—
Garside
v.
King. which he had previously mortgaged to the plaintiff—
nothing was paid. Now, although the section relied
upon is peculiarly framed,^a we are by no means pre-
pared to accede to the proposition that it has the effect
of rendering a subsequent voluntary assignment effec-
tual, in virtue of prior registration, against a *bona fide*
purchaser for value. It seems to us that the legisla-
ture had no such intention.

But were it otherwise, the assignment to *Williams*
had not been in fact registered. The plaintiff's title
is prior in point of time. The legislature have de-
clared that a subsequent assignment, first registered,
shall prevail against a prior title. But no subsequent
assignment has been so registered; and no authority
has been cited to shew that an attempt to register can
have the effect of actual registration.

Judgment. Then, assuming the defendant not to have acquired
priority under the act, by registration or otherwise,
the plaintiff's title must prevail, as it would seem,
under the rule "*qui prior est in tempore potior est
in jure*," unless the defendant has shewn himself to
have acquired a better right to call for the legal
estate (a). This latter question was not discussed
upon the argument, and it is unnecessary that we
should pronounce any opinion upon it, because, as I
have said, were the defendant to succeed on all those
points, that would not, in our opinion, disentitle the
plaintiff to relief.

William King has made no attempt to prove
the case set up by his answer. The plaintiff's
case—as between himself and *Wm. King*—is estab-
lished satisfactorily by the documents before us.
They are wholly irreconcilable with the answer,

(a) *Wilmot v. Pike*, 5 Hare, 14.

which is not only unsustained by proof, but has been falsified throughout by evidence of the most conclusive character. Take, as an example, the allegation that the bond from the plaintiff to himself had never been in his possession, but had been deposited with *D. E. Boulton* as the agent of both parties. Now that very bond was produced by Messrs. *McBean & Strong*; and they proved that it had been assigned to them by the defendant himself, in security for a debt of 133*l.* due to them from the defendant.

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Garside
v.
King.

The only question therefore is, was the transaction of the 15th of October 1849 a sale of *King's* interest to *Williams*; or was it, as alleged by the bill, a loan to *King*, secured by the assignment of that date, in the present form, for the purpose of evading the statutes of usury? The question is not one between *King* and *Williams*. *Garside*, who was not a party to the deed, says "that the transaction was not in reality as it is represented by the deed of assignment. The instrument executed by these parties is, it is true, an absolute assignment; but I am prepared to shew that it was a mere security for a loan." Now, there can be no doubt, I apprehend, of the admissibility of parol testimony under such circumstances and for such purpose. Here, however, the answers of these defendants are all but conclusive.

Judgment.

The value of the premises in question has been variously stated at from 500*l.* to 800*l.* Mr. *Strong* says that 100 acres adjoining were recently sold for 350*l.* He estimates this property at 800*l.* He says that the defendant *Wm. King* considered it of that value; always spoke of it as affording him the means of paying his debts; and applied to various persons to advance the sum required to take out the patent. *Strong*, *McBean* and *McEvins*, have all deposed to statements made by *Wm. King*, to the effect that *Williams* had advanced the amount necessary to obtain the patent.

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Garside
v.
King.

Judgment.

Now let us look to the account given by these defendants of the transaction which is relied upon as having been an absolute sale of *Wm. King's* interest in this property. We have little if any information as to the circumstances which preceded the assignment of the 15th of October 1849. *Williams* says merely that he refused to treat with *King* until he had satisfied himself as to the validity of the contract and the amount due; and having ascertained the particulars in relation to both points, he informed *King* that he would pay for the property no more than the sum due the government; and thereupon the assignment is at once executed. The other defendants agree in the account of the matter given by *Williams*. Now, stopping at this point, it would have been difficult to have persuaded oneself that these parties really intended a sale; but the further statements in the answers appear to us to place the matter beyond doubt. *Williams* says, "That for all this defendant knows to the contrary, the said *King* may have had it in view to purchase the said premises from this defendant after this defendant had obtained the patent for the same; and this defendant in fact believes he had it in view either that he would himself or that a son of his would purchase the said premises from this defendant; for this defendant saith that on the occasion of this defendant receiving the said assignment from the said *King*, this defendant informed the said *King* that the said lot would be for sale when this defendant obtained the patent for it: to which the said *King* replied—'*I know two or three persons who would be glad of it; what will be the price of it, you selling at a credit of five or six years?*' to which this defendant replied, 225*l.*; and the said *King* then said '*then I know a person who will take it—Andrew King of Monaghan;*' and this defendant replied, *he may have it.* And this defendant is informed and believes, that the said *A. King* is a son of the said defendant *King*. And

afterwards the said *King*, on more than one occasion, spoke to this defendant on behalf of the said *A. King* for the purchase of the said premises; and the defendant agreed with the said defendant *King*—*acting, and professing to act, as the agent of the said A. King*—to sell to the said *A. King* the said premises on the terms in the bond hereinafter set forth mentioned. And accordingly, several days after the said 15th day of October, but when more particularly this defendant cannot recollect, this defendant signed and sealed, *but has not yet delivered, a bond dated the 15th day of October 1849.*

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Now, keeping in view the value of this property, and attending to the circumstances of the parties, it would be extremely difficult, we think, upon this statement, to arrive at the conclusion that a sale was contemplated. *Wm. King's* interest in this property was of considerable value. He looked to it as furnishing the means of extricating him from his difficulties. Did he mean to transfer that interest to *Williams* without consideration? Had *Williams* been in reality the owner of the estate, would he have sold it in the way described to a mere stranger, whom he had never seen upon the subject, for a third or fourth part of its value? Would he have so sold it without receiving any part of the purchase money and without any contract to secure its payment? Why was not the bond delivered to the supposed purchaser? *Andrew King* admits that he never required the bond to be delivered; and, indeed, that he never saw the vendor on the subject of this very advantageous purchase. Nothing short of the clearest testimony would have warranted us in holding that these parties contemplated a sale under such circumstances; but these defendants have not only failed to adduce any such evidence, but have not even denied the allegation in the bill that the real contract was an advance by *Williams* to obtain the

Judgment.

1851. patent, and an assignment of *King's* interest to secure its repayment. The case seems to us free from doubt.

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King.

We think the plaintiff entitled to receive the patent upon payment of the amount advanced by *Williams*, with interest, which he is to be at liberty to add to his debt. The plaintiff must pay *Williams* his costs; but the costs so paid, and the costs of the suit, must be paid by *William King*.

Judgment.

Novemb'r 21 Mr. *Crickmore*, this day, asked the court to vary the minutes of the decree, so that the plaintiff might be enabled at once to procure the patent to be issued to him, without first paying the defendant *Williams*; the plaintiff undertaking to satisfy any claim *Williams* might afterwards appear to have upon the property. The court refused the application, and the decree as finally passed and entered, was as follows:—

Decree.

This court doth declare that the said defendant *John Tucker Williams* is a mortgagee of the premises in the pleadings mentioned, for securing to him the re-payment of the sum of one hundred and eighty pounds seven shillings and one penny, paid by him for the said defendant *Wm. King*, to the government on account of the purchase of the said premises, and that the said plaintiff is entitled to redeem them: and it is ordered that it be referred to the Master of the Court, to take an account of what is due to the said defendant *John Tucker Williams*, for principal money as aforesaid, and to compute interest thereupon up to the period of six months after the making of his report, and to tax to the said defendant *John Tucker Williams* his costs of this suit. And upon the said plaintiff paying to the said defendant *John Tucker Williams* what shall be reported due to him for principal money and interest aforesaid, together with the said costs, within six months after the Master shall have made his report, at such time and place as the Master shall appoint, this court doth declare that the said plaintiff is entitled to have letters patent forthwith to issue to him for the said premises, being lot number fifteen in the seventh concession of the township of Hamilton, and doth order that the same defendant *John Tucker Williams* do convey all his interest in the said premises and deliver up all deeds, papers and writings in his custody or power, relating thereto, upon oath, to the said plaintiff, or to whom he shall appoint. And it is ordered that the said plaintiff do pay to Her Majesty's Attorney General his costs of this suit; and it is hereby referred to the Master of this Court to tax the same. But in default of the said plaintiff making such payment to the said defendant *John Tucker Williams* as aforesaid, it is ordered that the plaintiff's bill of complaint do stand dismissed out of this court, with costs to be paid by the said plaintiff to the said defendants; and that thereupon the said defendant *John Tucker Williams* will be entitled to have letters patent for the said premises to issue to him. And in the event of the said plaintiff redeeming the said defendant *John Tucker Williams*, it is ordered that it be referred to the

Master of this court to take an account of what shall be due to the said plaintiff, for principal money and interest upon his mortgage security in the pleadings mentioned, together with what he shall so pay to the said defendant *John Tucker Williams*, and also what he shall so pay to the Attorney General, together with interest thereon respectively up to the period of six months after the making of his subsequent report, and to tax to the said plaintiff his costs of this suit. And upon the said defendants *William King* and *Andrew King* paying to the said plaintiff what shall be reported due to him for principal money and interest upon his said mortgage, and what he shall have so paid to the said defendant *John Tucker Williams* and the Attorney General, and interest thereon respectively, together with his said costs, within six months after the Master shall have made his report, at such time and place as the Master shall appoint, it is ordered that the said plaintiff do convey the said premises, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and deliver up all deeds and writing in his custody or power relating thereto, upon oath, to the said defendants *William King* and *Andrew King*, or to whom they shall appoint. But in default of the said defendants *William King* and *Andrew King* paying to the said plaintiff what shall be found due to him for principal and interest on his said mortgage, and what he shall have paid to the said defendant *John Tucker Williams* and the said Attorney General, and interest thereon respectively, together with his said costs, by the time aforesaid, it is ordered that the said defendants *William King* and *Andrew King* do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said premises. And in the event of such default as last aforesaid, it is ordered that the said defendant *William King* do pay to the said plaintiff his costs of this suit, and the costs of the said Attorney General, to be taxed by the Master, in case the parties differ.

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King.

Decree.

HOULDING V. POOLE.

Voluntary deeds.

Where there are two voluntary settlements, the Court will, at the suit of those interested under the first, set aside the subsequently executed settlement; and it is no objection to relief in such a case that courts of law would give effect to the first against the second. November 2
and
December 2

The proper parties having been added in this cause, according to the judgment (*ante* page 206), the cause now came on again for hearing. The merits had on the former occasion been argued at the bar; and now

Mr. Gwynne, Q. C., and Mr. Hector, for the plaintiffs, asked for a decree according to the prayer of the bill. Argument.

Mr. Carruthers, for the defendants, the trustees, submitted to any decree the Court might think proper to make.

No one appeared for the defendant *Caleb Poole*.

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Poole.

December 2

The judgment of the Court was now delivered by

ESTEN, V. C.—This case having stood over with liberty to the plaintiff to amend by adding parties, the necessary parties have been added, but no other alteration has been made in the record. The case, as it appears upon the pleadings and evidence, is as follows:—

Judgment.

In 1839, a voluntary settlement was executed by *Wm. Poole* in favor of the plaintiffs; in 1847 another voluntary deed was executed by *Wm. Poole* in favor of the defendant *Caleb Poole*. I assume the former instrument to be voluntary, as placing the case in the strongest light in favor of the defendant. That the latter deed was voluntary appears from the admission of counsel at the original hearing, the evidence, and the result of the trial at law, as represented and admitted in the course of the former argument. *Prima facie*, the latter deed, which is wholly void both at law and in equity, should be delivered up to be cancelled; for it is clear that the Court will interfere for that purpose between two voluntary settlements (a); and I think, under the circumstances of this case, with costs.

Then, is there anything in the conduct of the plaintiffs which should preclude them from this relief? It seems not. The defendant must prove the fraud which he alleges, and which of course is not to be presumed in his favor. If we look at his own evidence, to which we must resort in the first instance for this purpose, we find only one fact of any importance in this respect. This fact is the declaration made by *Wm. Poole*, not only upon his death-bed but at other times, in relation to the circumstances alleged to have attended the execution of the deed in favor of the plaintiffs. These declara-

(a) *Naldred v. Gilham*, 1 P. W. 577; *Young v. Cottle*, id. 102; *Clavering v. Clavering*, 2 Ver. 473.

tions, in our opinion, perhaps all, but certainly the dying declaration furnish strong proof of fraud— but it is fraud on the part of the defendant, and not of the plaintiffs.

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If we turn to the evidence on the part of the plaintiffs, it furnishes no evidence of fraud whatever. The disposition of the property in the plaintiffs' favor was suggested to *Wm. Poole*, and in some degree perhaps pressed upon him; he appears, however, to have been perfect master of his own actions—to have understood thoroughly what he was doing, and to have done it willingly; four days intervened between the preparation and execution of the deed; *Walker* was present at his instance, and subsequently gave instructions for the preparation of the deed, and was present at its execution; the only lawyer who interfered in the transaction was certainly employed by the direction and on behalf of *Wm. Poole*; the deed was read to him towards the close of the year 1841, and he acquiesced in this disposition of his property for seven years. Then, it was a most natural and proper disposition, under the circumstances of the case.

Judgment.

An attempt was made by the defendant's counsel, in the course of the former argument, to throw discredit upon the evidence of *Richard Brooks*. In its most important particulars, however, it is strongly corroborated by the answer. It is impossible to entertain the smallest doubt that *Isaac Poole* must have received and applied to his own use, after making every proper deduction, a considerable amount of property belonging to the plaintiffs, *Elizabeth Houlding* and *Mary Ann Meade*. This, I admit, was done with their consent; but it created a strong moral obligation, to say the least of it, on the part of *Isaac Poole* and any one claiming under him voluntarily, to make some disposition of the property acquired in this country in their favor; and *Wm. Poole* appears

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1851. *Houlding v. Poole.* to have executed the deed in question in fulfilment of this obligation. As therefore it is clearly established that the Court will interfere in cases of this nature in favor of the person claiming under the first settlement, and nothing appearing in the conduct of the plaintiffs, or the mode of obtaining the deed under which they claim, or the circumstances attending its preparation and execution, to preclude them from the assistance of the Court, the relief customary in such cases ought to be given, unless some insuperable objection to granting it has been raised on the part of the defendant. Now, what are the objections which he has made to a decree in favor of the plaintiffs in the present case? The first objection is, that the Court will not interfere between volunteers. It would be very unfortunate if such an objection could be sustained. The property having been completely departed with by the settler, and belonging of necessity to one or the other of the contending parties, it is very desirable that whichever shall appear to be entitled to it shall enjoy it without disturbance from the other; but the authorities which have been already cited shew that this objection cannot be supported.

Judgment.

The next objection which has been raised by the defendant is, that the conduct of the plaintiffs has been such in obtaining the deed from *Wm. Poole*, that the Court will not afford them any assistance—in other words, that they do not enter the Court with clean hands. The evidence, as has been already observed, shewed that this objection is entirely without foundation.

An attempt was made in the first argument to assimilate this case to that of *Evans v. Llewellyn* reported in 1 *Cox*, 333. The two cases, however, differ in some very important particulars. In the case of *Evans v. Llewellyn* the plaintiffs were in a state of poverty and distress, while the rank and station of the contracting parties were very unequal,

and one of the plaintiffs was in the defendant's power. There, the transaction was a sale, and not a voluntary settlement; and not only was the consideration grossly inadequate, but a material fact was concealed by the defendant from the plaintiffs—namely, that a larger sum than they received for their whole interest in the property was actually due to them in cash at the time, for arrears of rents and profits received by the defendant. Much stress was also laid by the Master of the Rolls on the strong temptation to which the plaintiffs were subjected by the sudden offer of so considerable a sum as two hundred guineas to persons in their needy circumstances. Upon the whole, the two cases seem to be widely dissimilar.

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Poole.

The next objection made by the defendant is, that both deeds being voluntary, the latter is void at law, and has acquired no priority by means of its prior registration over that of the plaintiffs; and therefore, the only relief to which the plaintiffs can claim to be entitled is the delivery-up of the defendant's deed to be cancelled, as forming a cloud upon their title; which relief the defendant contends, however, the Court is not accustomed to extend when the instrument of which the destruction is sought is void on its face; and he argues that such is the case in the present instance, since it is only necessary to collate the two instruments to see that the latter one is wholly void. In this part of his argument, however, the defendant, while he enunciates a correct principle, makes a wrong application of it. The defendants' deed is not void on the face of it; for if the settlement under which the plaintiffs claim were mislaid or destroyed, and they were unable to produce secondary evidence of its execution and contents, the defendants' deed would prevail: whereas the principle established by the authorities is, that in order to prevent the Court from interfering in cases of this

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nature, the instrument of which the delivery is sought must condemn itself, and must appear to be void from the evidence afforded by its own contents merely, without being compared with any other instrument, and without any extraneous evidence whatsoever; so that under no possible conjuncture could it be produced or used to the injury of the party seeking its destruction.—*Haywood v. Dimsdale* (a); *Smyth v. Griffin* (b); *Franco v. Boulton* (c); *Simpson v. Lord Howden* (d); *Williams v. Flight* (e); *Bromley v. Holland* (f); *Duncan v. Worral* (g).

Judgment.

We do not desire to infringe in the slightest degree upon the principle that a plaintiff stating a case of fraud or undue influence upon his bill, and failing to establish it in evidence, is not entitled to relief on any lower ground. We are of opinion that the plaintiffs are entitled to the only relief which the nature of the case renders necessary; and we can not refuse them that relief on the ground that they have relied upon a case of fraud in their bill, but have failed to establish it in evidence, when the evidence is of such a description that the plaintiffs might fairly call upon us either to grant them relief at once if necessary, on the ground of fraud, or at all events to put the case in a course of trial, for the purpose of ascertaining the fact. The Court declining to do what would be productive only of expense, which is wholly unnecessary for an adjudication upon the substantial merits of the case, cannot deny relief to the plaintiffs on the ground of any failure on their part to establish their principal case in evidence. We think that there should be a decree for the delivery of the deed in question to be cancelled, with costs.

(a) 17 Ves. 111. (b) 13 Sim. 245. (c) 3 Ves. 368. (d) 3 M. & C. 97.
 (e) 5 Bea. 41. (f) 7 Ves. 20. (g) 10 Pri. 31.

SMITH V. MEREDITH.

1851.

Practice—Revivor.

Where any of the parties to a suit die, and it is necessary to bring the representatives of such deceased parties before the Court, an order December 19
to amend the bill for that purpose will be granted.

This was an application by Mr. *Crickmore*, on behalf of the widow and devisee of the plaintiff, for an order to amend, in the nature of a bill of revivor, under the orders of May 1850. The bill was for redemption of a mortgage; and the mortgagor had died after the institution of the suit, having given all his property, both real and personal, to his wife, her heirs, executors and administrators, and appointed her sole executrix of his will. The motion was founded upon affidavit, shewing the foregoing facts.

No one appeared on the other side, and the Court granted the application, whereupon the following order was drawn up:—

Upon motion of counsel of *Elizabeth Smith*, the widow and devisee of plaintiff, and upon hearing read the affidavit of the said *Elizabeth Smith*, and upon hearing what was alleged, etc., it is ordered, that the bill filed in this cause may be amended, in order that the defect caused by the death of the above-named plaintiff may be remedied and the suit continued, and the benefit thereof obtained. And it is ordered that such amendments be made within fourteen days from the date hereof.

It seems from the books which have treated of this subject, that the proper form of bill under the old practice in this case would have been an original bill in the nature of a bill of revivor. Upon reference to the 14th of the orders of May 1850, it will be found that this form of bill is abolished, and an amendment substituted in its stead. The motion, therefore, was in strict accordance with this order.

A subpoena to answer the amended bill was issued in the usual manner.

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HILL V. HILL.

Practice—Dismissing bil.

An order to amend having been obtained and served after service of a notice of motion to dismiss, was deemed a sufficient answer to such motion.

Statement.

This was a motion to dismiss the bill for want of prosecution. The suit had been commenced before the introduction of the orders of May 1850, and was governed therefore by the old practice. More than three weeks had elapsed after the answer of the defendant, who made the motion, was to be deemed sufficient; but there were several defendants, and at the time of the motion, four weeks from the time that the last of the answers was to be deemed sufficient had not elapsed, and in the interval between service of the notice and the hearing of the motion the plaintiff had obtained an order to amend, which was the first order to amend that had been obtained.

Argument.

Mr. *Cooper*, for the defendant who made the motion, contended upon the authority of the case of *Davies v. Davies* (a), that it was not sufficient to obtain and serve the order to amend, but that service of a subpoena to answer the amended bill was also necessary to stop the motion to dismiss. Mr. *Morphy* for the plaintiff, relied on the case of *McNab v. Gwynne* (b).

Judgment.

The motion was refused without costs, these having been the subject of an arrangement between the parties.

This case, being clear upon the practice, would not have been reported had not the learned counsel for the defendant, who made the motion, considered the question involved in sufficient doubt to make it proper to press the motion, in order to have it decided.

(a) 1 Russ. 153, note. (b) Ante vol. 1, p. 127.

The case of *Davies v. Davies* was upon the practice which prevailed before the orders of 1828, and decided that where an order to amend had been obtained but not acted upon, and a second motion to dismiss was met by an undertaking to amend within ten days, the amendment of the record and of the defendant's office copy without service of a subpoena to answer the amended bill was not such a proceeding in the cause as satisfied this undertaking; and therefore that an order as of course dismissing the bill for want of prosecution, obtained after the expiration of the ten days, was regular. This case had no bearing upon the question before the court; but it may probably be held in conformity with it, that under the usual condition in the order to amend within ten days, it will not be sufficient to amend the record and office copy, but that service of a subpoena to answer the amended bill will also be required.

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v.
Hill.

SWITZER V. BOULTON.

Practice—Examination of Witness.

Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit was afterwards committed to the Provincial Penitentiary, and refused to be examined in this cause, the Court ordered the witness's evidence given at *Nisi Prius* to be read from the Judge's notes who had tried the action at law. December 22.

The bill in this cause prayed a declaration that an absolute deed which had been executed between the parties or those under whom they claimed was intended and operated as a mortgage only, and the consequential relief. One of the defendants, the devisee of the lands embraced in the supposed mortgage, had brought an action of ejectment against the plaintiff to recover possession of the property. At the trial of the action a witness of the name of *Patrick Henderson* had been examined on the part of the plaintiff in equity, the defendant at law, for the purpose of proving the deed in question to be a

Statement.

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Statement.

mortgage, although what bearing such evidence could have had on the points in issue at law was not apparent. Since the trial of the ejectment, *Patrick Henderson* had been committed to the Provincial Penitentiary, and was in confinement when the plaintiff in this cause desired and attempted to examine him as a witness on his behalf. Upon this occasion the solicitor and counsel of the respective parties attended, together with the Examiner of the court, at the Penitentiary, for the purpose of obtaining the evidence of *Henderson*, but he positively refused to be examined, obviously from the consideration that no severer punishment could be inflicted upon him for his contumacy than he was then enduring, and that his refusal might possibly lead to his liberation. Under these circumstances the present application was made, for the purpose of obtaining an order to shew the purport of the evidence of *Henderson* at the trial of the ejectment, through the medium of the judge's notes.

The application was supported by affidavits of the foregoing facts; affidavits were also produced on the other side, proving letters written by *Henderson* from prison, from which it appeared that he was prepared to shape his testimony in such a way as would conduce, in his opinion, most effectually to his liberation

Argument. Mr. *McDonald* for the plaintiff.

Mr. *Crickmore* for the defendants.

The following cases were cited:—*Gason v. Wardsworth* (a); *Carrington v. Cornock* (b).

Judgment. *Per Curiam*.—In the case of *Carrington v. Cornock*, cited in the argument, the Vice-Chancellor of England observed that "if any of the witnesses in the

(a) Amb. 108. (b) 2 Sim. 567.

cause of *Carrington v. Jones* are dead, the Court will order the depositions of those witnesses to be read in this cause, saving exceptions." Now, in the case before us, the witness *Henderson* is as much beyond the power of the plaintiff as if he were dead, and we think the plaintiff must, subject to all just exceptions, be at liberty to read the evidence given by *Henderson* on the trial of the action of ejectment; the parties to that action being substantially the same as those interested in this suit.

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Boulton.

That the evidence of *Patrick Henderson*, now confined in the Provincial Penitentiary at Kingston, and who refused to be examined as a witness in this cause, be read from the judge's notes, or an examined copy of the notes of the judge who tried the action of ejectment on the demise of *Sarah Anne Boulton* against the said *William Switzer*, and in which the said *Patrick Henderson* gave evidence on some of the matters that are at issue between the parties in this suit; saving all just exceptions.

Order.

HEAL V. HARPER.

Creditor's suit—Sale of Lands.

A sale of real estate had taken place in pursuance of the decree made December in a creditor's suit. It appeared that the legal estate remained in the debtor's vendors, to whom there was still owing a part of the purchase money agreed to be paid by their vendee. The Court, upon motion of the parties beneficially interested, ordered the vendors, upon payment of the amount due to them, to convey to the purchaser under the decree.

In this case a sale of the real estate and payment of the purchase money into court in the usual manner, together with the execution of the conveyances by all necessary parties, to be settled by the Master in case the parties should differ, had been ordered. Part of the real estate consisted of land purchased from the Canada Company, a portion of the purchase money of which remained unpaid, and part of it was now due; and the legal estate remained in the Company, who had appeared in the Master's office under the decree and claimed the unpaid balance of the purchase money. A sale of this property had been

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v.
Harper.

effected under the decree, and this was a motion by Mr. *McDonald* on behalf of the parties beneficially interested, who were infants, that the Canada Company, who had received notice of the motion, should, on receiving the unpaid balance of the purchase money, join in the conveyance to the purchaser.

Mr. *Brough*, for the Company, consented; and the other parties being present and not objecting, and the purchaser being also present and consenting, it was ordered accordingly.

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PRINCIPAL MATTERS.

ABSENT DEFENDANTS'
ACT.

(14 & 15 Victoria, Chapter 10.)

1. Where a person is served under the statute 14 & 15 Victoria, ch. 10, as agent for an absent defendant, but is not such agent, he may in his own name move the Court to set aside such service.

Doremus v. Kennedy, 657.

2. A visit of two months' duration to Upper Canada is such a residence as brings a defendant within the statute.—*Ib.*

ADMINISTRATION.

Ad litem (suit.)

1. Where in a creditor's suit, to administer the estate of a deceased debtor, to whose estate administration *ad litem* had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them *pro confesso*, and did not appear at the hearing; the Court made the usual decree, without requiring a general administration to be first obtained.

Dey v. Dey, 149.

2. In an administration suit, it appeared that the step-father of one of the children of the deceased, and who had the care of such child, had been sued for the child's board while at school, his mother

being a creditor of the estate and neither she nor her husband having any funds to pay for such board, while there were funds applicable thereto; *Held*, that the step-father should be allowed the costs of such suit.

Menzies v. Ridley, 544.

3. In an administration suit, the widow of the testator had made a claim for dower, which had been allowed; and upon an appeal from that decision, the Court of Appeal reversed the judgment of the Court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of the appeal; the appellants having paid their own costs of the appeal, this Court upheld the finding of the Master in allowing them such costs out of the estate.—*Ib.*

ALIMONY.

The Court having, since its first establishment (1837), exercised jurisdiction in cases of alimony, refused to question the right to exercise such jurisdiction in a clear case for relief.

Soules v. Soules, 299.

AMENDMENT.

1. Where, after the time for amending as of course, an order is obtained to amend by adding a party "with apt words to charge him or otherwise, as plaintiff shall be ad-

vised," the plaintiff is not at liberty to make any amendment whatever, except such as is required for the purpose of introducing the additional party.

Gillespie v. Grover, 120.

2. Where a motion is made to amend the bill, under the 13th of the orders of May 1850, a draft of the proposed amendments must be laid before the Court upon the application, but it need not be set out in the notice of motion.

Applegarth v. Baker, 428.

3. The plaintiff, upon making such a motion, will be required to satisfy the Court, first, of the truth of the proposed amendment; and secondly, of the propriety and expediency, with a view to the ends of justice, of permitting the amendment under all the circumstances, and at the particular stage of the cause.—*Ib.*

4. With respects to the costs of motions to amend under the 13th order of May 1850, no general rule can be laid down, each case must depend upon its particular circumstances.—*Ib.*

APPROPRIATION OF PAYMENTS.

A creditor who takes a mortgage from his debtor for 2000*l.* (part of a debt of 2414*l.* 18*s.* 11*d.*) and afterwards renders accounts, commencing with the balance of 2414*l.* 18*s.* 11*d.*, taking no notice of the mortgage for 2000*l.*; and in such accounts credits (without any objection by the debtor) sums received after the mortgage was given, but before it fell due: *Heid*, that this proved an appropriation of such sums towards payment of the original debt, including that part of it which was secured by mortgage.

Re Brown 590, S. C. 111.

ARBITRATION.

See "Injunction," 8.

BANKRUPT.

1. Where the estate of a bankrupt is sufficient to pay twenty shillings in the pound, and a surplus still remains, interest must be allowed on all debts proved under the commission, where the debt, by express contract or statutory enactment bears interest, or where a contract to pay it, is to be implied, before the surplus is handed over to the bankrupt, but on no other debts will interest be allowed.

Re Langstaffe, a bankrupt, 165.

2. To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party.

Torrance v. Winterbottom, 487.

COMMISSION.

For taking Depositions.

The 53rd General Order of May 1850 does not apply to a foreign commission for taking depositions.

Anonymous, 122.

CONDITIONAL SALE.

1. Where a party being in close custody at the suit of another agreed to execute a conveyance to him as a security for the amount of his debt and costs, and executed an assignment accordingly in pursuance of that agreement, but the instrument, as drawn up and executed, was deemed in point of legal effect to operate as an absolute assignment of his interest in the estate, giving the assignor a right of re-purchase, and after the day of payment had elapsed this deed was set up as a bar to the party's right to redeem, parol evidence was admitted to show the real nature of the transaction, on the ground of fraud.

Stewart v. Horton, 45.

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COSTS.

2. One of the tests by which a conditional sale is distinguished from a mortgage is the adequacy of the consideration: Where therefore it was shown that the plaintiff had conveyed an estate for less than one-fourth of its value, with a clause giving him a right of repurchase, the conveyance was declared to be a security only.—*Id.*

CONTEMPT.

Where an order is made upon a receiver for payment of a sum of money, the Court on default, will commit for a contempt of such order, without requiring any further order to be served.

McIntosh v. Elliott, 396.

The Court refused a motion to commit for breach of an injunction, where the defendant made an affidavit of having complied with the writ, even though the affidavit was contradictory to a statement previously made by him; but the defendant was ordered to pay the costs of the motion, as his conduct had caused the motion to be made.

Campbell v. Gorman, 403.

COSTS.

1. Where one of two partners denied the existence of a partnership, and a bill was in consequence filed against him, and by the evidence taken in the cause the partnership was established, the Court gave the plaintiff the costs up to hearing, also the costs of a consent reference as to the fact of partnership, and beyond that refused costs to either party.

O'Lone v. O'Lone, 125.

2. Where a mortgagee files a bill to foreclose, and a question arises at the hearing, whether he has not received sufficient to pay off the incumbrance before the

CREDITOR'S SUIT. 699

commencement of the suit, the costs will be reserved.

Gooderham v. DeGrassi, 135.

3. Where trustees filed a bill for the purpose of having the trusts of the deed appointing them carried into execution, without suggesting the existence of any difficulty in the way of their winding up the affairs of the estate, the Court refused them their costs of the suit.

Cummings v. McFarlane, 157.

4. Where a trustee set up an improper claim to the property, the subject of the trust, and a bill was filed to compel him to deliver up possession and account; the Court charged him with the costs of suit up to the hearing, reserving the consideration of interest and subsequent costs.

Fisher v. Wilson, 260.

See also "Specific Performance," 11, 12.

CREDITOR'S SUIT.

1. Where in a creditor's suit, to administer the estate of a deceased debtor, to whose estate administration *ad litem* had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them *pro confesso*, and did not appear at the hearing; the Court made the usual decree, without requiring a general administration to be first obtained.

Dey v. Dey, 149.

2. An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage settled certain land (the subject of the suit) in trust to the use of the wife for life, with power of sale to the trustee, to be exercised with the

husband's consent. The legal estate was in one R., who had a primary charge on the premises. Under these circumstances, it was decreed that the plaintiff was entitled to redeem R.; that the wife's estate was exempt from every charge other than that of R.; that of this charge she must either keep down the interest or pay a proportionate share of the principal; that she was entitled to a provision out of her life estate; that subject to her interest, the property, on R. being paid, should be sold; and an enquiry was directed as to other judgments, in order to a proper application of the proceeds.

Pemberton v. O'Neil, 263.

3. A sale of real estate had taken place in pursuance of the decree made in a creditor's suit. It appeared that the legal estate remained in the debtor's vendors, to whom there was still owing a part of the purchase money agreed to be paid by their vendee. The Court, upon motion of the parties beneficially interested, ordered the vendors, upon payment of the amount due to them, to convey to the purchaser under the decree.

Heal v. Harper, 695.

CROWN LANDS.

A vendee of the Crown transferred his interest by way of mortgage to a person, who took *bona fide*. Afterwards the vendee made a second assignment for a nominal consideration of 200*l.*, but no money did in fact pass, the consideration mentioned being intended to cover the amount which the assignee would be obliged to pay to the government for the balance due on the contract with their vendee. On a bill filed by the mortgagee to set the second conveyance aside—*Held*, that as against

the plaintiff the second deed was voluntary; and even if it had been registered under the statute regulating the sale of Crown Lands, it would not have prevailed against the prior incumbrance of the plaintiff. *Garside v. King*, 573.

DEBTOR AND CREDITOR.

1. Where a creditor held a security on lands of his debtor for a specific amount, and afterwards, in rendering his accounts to his debtor, carried the amount of such mortgage into the general account, and having received from the debtor, and on his account, several sums of money, which, as the creditor alleged, were to be credited on certain other dealings between the parties, but instead thereof they were carried to the debtor's credit generally: *Held*, that notwithstanding any previous agreement that might have existed between the parties, that this was such an expression of the final determination of the parties as precluded any inference from their previous conduct, and that therefore the receipts must be applied, in the first instance, to the reduction of the sum secured by the mortgage security.

Re Brown 111, S. C. 590.

2. Where a debtor, in order to effect a compromise with his creditors, offered a mortgage on certain property, which property he represented as belonging to another person, who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that, before it was executed, the debtor had obtained a conveyance of the property to himself: *Held*, that such conveyance was, under the circumstances, subject to the mortgage.

Fraser v. Sutherland, 442.

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EQUITY OF REDEMPTION.

3. In suits by judgment creditors for the sale of the debtor's property, the debtor is entitled, like a mortgagor, to six months to redeem before the sale takes place. The rule prescribed by the statute 43 George III., chapter 1, is not applicable to the practice of this Court.

White v. Beasley, 650.

DECREE.

The Court will not set aside a decree which has been regularly obtained upon precipe under the orders of this Court, except upon an affidavit shewing that the defendant will be damnified by the decree being permitted to stand against him.

Mitchell v. Crooks, 123.

DE INTERESSE SUO.

The effect of a claimant's examination, *de interesse suo*, considered.

Prentiss v. Brennan, 582.

DEMURRER.

See "Pleading," 1 to 4.

DISMISSING BILL.

1. The Court will not upon motion dismiss a bill "without prejudice to the plaintiff's filing another bill."

Gwynne v. McNab, 124.

2. An order to amend having been obtained and served, after services of a notice of motion to dismiss, was deemed a sufficient answer to such motion.

Hill v. Hill, 692.

EQUITY OF REDEMPTION.

1. *Quere*—Whether a sale by the sheriff, under a *fi. fa.* against lands, of the reversion, after a term of 1000 years had been created by way of mortgage, carries

with it the right to redeem the term.

Chisholm v. Sheldon, 178.

[26th Feb. 1852.—The Court of Appeal, (*Blake, C. dissente*) decided the question in the affirmative.]

2. Upon a judgment obtained against the executors of a mortgagor a writ against the lands of the testator was sued out, under which his interest in the mortgage premises was sold; and afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mortgagee—all which transactions took place after the passing of the statute 7 Wm. IV. ch. 2 [1837]: *Held*, that under such circumstances the devisees of the mortgagor were entitled to redeem.

Walton v. Bernard, 344.

3. *Held*, by *Esten* and *Spragge*, V. CC., that the purchaser at sheriff's sale of a reversion in land mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit.

Waters v. Shade, 457.

[The Court of Appeal, in the case of *Chisholm v. Sheldon*, decided 26th Feb. 1852, approved of this decision. (*Blake, C. dissente*).]

EXAMINATION OF PARTIES.

The statute 14 and 15 Victoria, ch. 66, does not authorize parties being received as witnesses on their own behalf.

Fuller v. Richmond, 509.

[The Court of Queen's Bench have ruled the contrary. See *Brennan v. Prentiss*, M. T. 1851.]

EXECUTOR.

1. Where a bill was filed by devisees against the executors of their

testator's will, alleging the inability of the executors to attend to the trusts of the will, on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead; the court dismissed the bill on the ground that the jurisdiction to interfere in such a case belongs to the Probate and Surrogate Courts, and not to the Court of Chancery; and inasmuch as the executors had been brought before the court without any fault on their part, the bill was dismissed with costs.

Corrigall v. Henry, 310.

2. A bill was filed in 1846, by devisees against executors, charging them with improper conduct in the management of the estate; and the answers were all filed within a year afterwards. No further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate.

Meacham v. Draper, 316.

3. Where an executor, who had renounced probate of the will, is made defendant to a suit, the bill can only be dismissed as against him with costs.

Stinson v. Stinson, 305.

4. A testator's sister having procured a marble slab to his memory; his widow who was the acting executrix of his will, having in hand no funds of the estate, gave her note to the sister for the price, which was moderate in reference to the estate and degree of the de-

ceased, but the note had not been paid, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees: The question did not affect creditors of the deceased, and it was not pretended that the estate was liable for the note or for the price of the slab. *Held*—under these circumstances, that the amount should be allowed to the executrix.

Menzies v. Ridley, 544.

5. An executor is entitled to interest on moneys advanced by him out of his own means and properly expended in the management of the estate.—*Id.*

EXHIBITS.

Proof of, by affidavit.

When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit.

Killaly v. Graham, 281.

FORECLOSURE.

1. It is not necessary for the mortgagee to remain at the place appointed by the Master's report during all the time limited for the payment of the mortgage money; his attendance so early as to allow a reasonable time for payment of the mortgage money before the expiration of the hour named will be sufficient.

Saunderson v. Caston, 436.

2. Where a bill of foreclosure had been filed by the executor and devisees of the mortgagee, and the executor alone attended at the time and place appointed by the Master for payment of the mortgage money to the plaintiffs; as it did not appear that the debts of the testator had been paid, the Court considered the plaintiff's en-

titled to the absolute decree of foreclosure in default of payment.

Evans v. Parker, 555.

3. It seems that the plaintiff will not be entitled to the absolute order of foreclosure against a subsequent mortgagee and the mortgagor, unless he be in a situation to reconvey the legal estate in the mortgage premises.

Ross v. Thompson, 624.

Where a mortgagee had become bankrupt, and he, together with his assignees had filed a bill to foreclose the mortgage, a final order of foreclosure was granted, although one of the assignees, on account of his absence from the country, had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment.

Lyman v. Kirkpatrick, 625.

FRAUD.

Where a party being in gaol on a charge of felony, was liberated upon the present defendant becoming bail for his appearance; and having in the interval between his liberation and trial executed a deed of his property to the defendant for an adequate consideration, afterwards filed a bill to set this conveyance aside on the ground of fraud, alleging that he had executed it under the impression, and upon the assurance of the defendant, that the deed was merely a recognizance for his due appearance to take his trial. This allegation being disproved, the court dismissed the bill, but without costs, and gave the plaintiff leave to file another, if he should be so advised, to set aside the conveyance on the ground of inadequacy of consideration and undue influence.

Vallier v. Lee, 600.

See also, "Pleading" 6.

FRAUDS, (STATUTE OF).

See "Pleading," 5.

FURTHER DIRECTIONS.

1. Under a decree for taking partnership accounts, in which the Master was directed to state special circumstances and make all just allowances, the Master reported that in taking the accounts, he had, amongst other things, charged one of the partners for his board, &c., with the other, after the dissolution of the partnership; *Held* wrong, and that the objection could be taken on the hearing on further directions.

O'Lone v. O'Lone, 125.

2. Where a decree, which reserved no further directions, directed that a sale or partition of the property in question should take place according as the Master might consider either course more for the interest of the parties, but contained no directions as to the conveyances or possession, or as to the execution of the deeds, and the Master reported in favor of a partition,—the Court, on motion, ordered the execution of conveyances and the delivery of the possession of the property agreeably to the finding of the Master.

S. C. 642.

GENERAL ORDERS.

1. Where a motion is made to amend the bill, under the 13th of the Orders of May, 1850, a draft of the proposed amendments must be laid before the Court upon the application, but it need not be set out in the notice of motion.

Applegarth v. Baker, 428.

2. The plaintiff, upon making such a motion, will be required to satisfy the Court, first, of the truth

of the proposed amendment ; and, secondly, of the propriety and expediency, with a view to the ends of justice, of permitting the amendment under all the circumstances, and at the particular stage of the cause.—*Id.*

3. With respect to the costs of motions to amend under the 13th Order of May, 1850, no general rule can be laid down ; each case must depend upon its particular circumstances.—*Id.*

4. Where an absolute decree was pronounced under the 37th Order of May, 1850, and the plaintiff, through inadvertence, served the defendant with an office copy of the bill and a notice in the terms of the 40th of those orders, the defendant applied to answer the bill and set aside the decree ; and it appeared by the affidavits filed in support of the application that the intended defence was a hard one and *strictissimi juris*, the Court refused the application.

Dixon v. Mills, 647.

5. The omission to serve a notice of having entered an appearance, or of having filed an answer, demurrer, or replication, pursuant to the 47th order, will not entitle the opposite party to treat such proceedings as a nullity, or as irregular.

Smith v. Muirhead, 395.

6. The 53rd general order of May 1850, does not apply to a foreign commission for taking depositions.

Anonymous, 122.

7. The 55th Order of May 1850, renders it no longer necessary to obtain a special order for the examination of witnesses in a cause before an examiner.

Fuller v. Richmond, 509.

Held per Cur.—*Spraggs*, V. C.

dissentiente—that in suits against infant defendants, the court would make a decree for summary reference to the Master under the 77th Order of May 1850 : the decree, however, directing that in the proceedings before the Master the plaintiff should be obliged in the first instance to prove the execution of the conveyances.

Creelman v. Cleford, 213.

8. In a cause in the nature of a redemption suit, the bill stated the existence of three several mortgages ; alleged one to be usurious, and the two others to have been made to secure larger sums than had been advanced ; prayed special relief, and that an account might be taken of the sums actually advanced and of the amount due ; and for redemption : A motion for an immediate decree under the 77th Order of May 1850, was refused, with costs.

Kelly v. Mills, 253.

9. Where a bill was filed against a trustee and executor for an account, and the bill also sought to have the trustee removed for misconduct, the court refused an order for a summary reference to the Master, under the 77th Order of May 1850.

Christie v. Sanders, 395.

10. Where any of the defendants are infants, the court will not grant a summary reference under the 77th Order, until a guardian to the infant defendants has been appointed.

White v. Cummins, 397.

11. On a motion for a summary reference, under the 77th Order, the affidavit verifying the bill must be filed before notice of the motion is served, and must be referred to by the notice.

Crawford v. Wilkinson, 406.

GUARDIAN.

The court will appoint the testamentary guardian a guardian *ad litem* to infant defendants without requiring all the infants to be produced in court, when it appears that the interest of the guardian is not opposed to that of the infants.

White v. Cummins, 487.

INFANTS.

1. *Held per Cur.*—*Spragge, V. C. dissentiente*—that in suits against infant defendants the Court would make a decree for summary reference to the Master under the 77th Order of May 1850; the decree, however directing that in the proceedings before the Master the plaintiff should be obliged in the first instance to prove the execution of the conveyance.

Cressman v. Cressford, 213.

2. Upon the re-hearing of a cause, where the decree of foreclosure did not reserve a day to the infant: *Held per Cur. (Blake, C. dissentiente)*, that in decrees of foreclosure against infant defendants, a day to shew cause, after attaining twenty-one, must be reserved to the defendants.

Mair v. Kerr, 223.

[Affirmed on Appeal, 26th February 1852.]

3. The subpoena and notice of motion for the appointment of a guardian had been served on the persons with whom infant defendants were residing; this was considered sufficient service to entitle the plaintiff to move.

Bowman v. Becktel, 556.

4. On a motion for the appointment of a guardian *ad litem*, under the 21st Order of May 1850, the Court (*Esten, V. C., dubitante*) permitted an affidavit, shewing that the defendants were infants to be

filed after the day named for the motion to be heard.

Freeland v. Jones, 591.

INJUNCTION.

1. The plaintiff contracted with two of the defendants for the manufacture by them of five thousand saw-logs, to be delivered at the mouth of the River Trent, for which he was to pay partly by instalments during the progress of the work, and the residue when the logs should be delivered at the place designated; and at the same time or immediately afterwards it was verbally arranged that the logs, as they were manufactured, should be marked with the plaintiff's initials, and should be delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the mouth of the river. The stipulated advances were duly made, and the logs as manufactured were marked with the plaintiff's initials, but not otherwise delivered to him. *Held*, that the manufacturers could not afterwards dispose of these logs to the prejudice of the plaintiff; and, having attempted to do so, by selling and delivering them to a third person for value, but who had notice of the plaintiff's claim, an injunction was granted to prevent their removal by such person.

Fuller v. Richmond, 24.

2. In a suit by the original owner of land and his vendee (to whom no conveyance had been made), the court upheld an injunction restraining an occupant of the land, and a person to whom such occupant had contracted to sell the timber on the lot, from cutting down the timber, such occupant having gone into possession under the owner; though it did

not appear that such timber was of any particular value to the plaintiff, and though the affidavits were contradictory as to the occupant having had authority from the owner to sell the timber

Lawrence v. Judge, 301.

3. An *ex parte* injunction had been granted to restrain the defendants, until further order, from interfering with certain saw logs in the Salmon River, and which the plaintiff claimed as his; the defendants having, notwithstanding obtained possession of the logs, a motion to extend the injunction so that, in effect, the plaintiff might receive possession of the logs from the defendants, was retained until after issues should be tried as to the plaintiff's property in the logs, this being disputed by the defendants.

Farwell v. Wallbridge, 332.

4. Where the town council of one of the towns mentioned in the schedule to the provincial statute 12 Victoria, chapter 81, were about proceeding to open a street without having first obtained the permission required by the statute of certain parties owning houses on the land over which the intended street would pass—the Court granted an injunction to restrain the opening of such intended street, upon a bill filed by a party whose land lay on the line of the intended street, although no house stood upon the plaintiff's land, and his premises were not within the exception contained in the proviso to the 60th clause of the act.

Wilson v. Town Council of Port Hope, 370.

5. A mortgage had been created by an absolute deed of conveyance, with a bond of defeasance; a judgment was afterwards obtained

against the mortgagee, and an execution sued out against his lands; the sheriff, under the writ so issued, had advertised, and was about to sell the mortgage property: upon a bill filed against the judgment creditor and the mortgagee, setting forth these facts, which were admitted by the defendants, the Court granted a special injunction restraining further proceedings under the writ.

Neil v. Bank of U. C., 386.

6. Where the common injunction is obtained to stay execution it will have the effect of staying a sale under the execution, notwithstanding the writ may be in the hands of the sheriff at the time the injunction issues.—*Id.*

7. The affidavits on which an *ex parte* injunction is applied for, must (to guard against abuse of that process) present a candid statement of the whole case, and must set forth not only the facts which the plaintiff thinks to be material, but such as are in truth material to the determination of the application: An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits.

Ley v. McDonald, 398.

8. The Court will relieve against an award made between partners in ignorance, on the part of the arbitrators and of the remaining partners, that important transactions had not been entered by the other, the managing partner, in the books of the firm, in consequence of which omission the award had been to a corresponding amount too favorable to such managing partner. An injunction to restrain proceedings on a judgment recovered at law upon an award al-

leged to have been made under these circumstances was continued to the hearing, in a case in which the ultimate success of the plaintiffs at the hearing was not considered as wholly free from question, the amount of the judgment being ordered into court.

Wilson v. Richardson, 448.

9. Where an action at law had been brought by a building society against W. as surety for the secretary of the building society; and W. filed a bill to restrain the action, founding his equity on a resolution or minute alleged to have been passed or made by the board of directors in the following terms—"That Mr. W. had requested that his security for the secretary might be cancelled. * * * It was suggested also, that Mr. R. W.'s name should be erased from the said bond by wish of the board, and both be relieved from securities. Mr. T. was requested to submit two other names as securities in place of the two gentlemen named"—the Court held that such a resolution afforded no ground for interfering with the action at law.

Whittemore v. Ridout, 525.

10. Although the Court had refused to grant an *ex parte* injunction to restrain the removal of certain chattels claimed by the plaintiff, and directed notice of motion to be given, an interim injunction was subsequently granted, on an affidavit being filed shewing that the defendants were in the act of removing the property, notwithstanding the notice of motion had been served.

Wilmot v. Maitland, 556.

11. A sale of the equity of redemption of certain mortgaged property had been effected under

a power of sale contained in a second mortgage deed; and, pending a suit in this court to set aside such sale, the first mortgagee, who was one of the purchasers, was proceeding at law to recover against the mortgagor upon the covenant contained in his mortgage deed; whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill, insisted upon the validity of the sale. From what had taken place in relation to the premises it was doubtful whether the mortgage debt was not extinguished, in equity, as between the mortgagor and mortgagee; and the original cause being almost ripe for hearing, an injunction was granted to restrain the action at law until the hearing took place.

Rees v. Beckett, 650

12. A purchaser having entered into possession under his contract, and failing to perform his agreement and to meet his payments after the time appointed, for that purpose had arrived, was restrained from committing waste or removing timber already cut down on the premises in question.

Ferrier v. Kerr, 668.

13. No injunction will be granted between tenants in common, except in cases of actual destruction; (*Semble*), but where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so, it being considered that his rights of ownership on his own moiety were to be exercised in subordination to his duty as trustee of the other moiety.

Christie v. Saunders, 670.

LACHES.

See "Specific Performance," 1,
9. "Partnership," 5.

LAND PATENTS.

This Court has jurisdiction under the provincial statute 4 and 5 Victoria, chapter 100, section 29, to rescind a patent for land, though the grant may be voidable or even void at law,

Martin v. Kennedy, 80.

LUNACY.

Where the estate of a person who has been found to be a lunatic is of small amount, the court will combine in one reference to the Master all the usual inquiries, although the several objects are in England the subjects of distinct and separate references.

Re Duggan, 622.

MORTGAGE, MORTGAGOR
AND MORTGAGEE.

1. Where an absolute deed of real estate had been executed, and the grantor, by his bill, alleged that the deed so executed was intended as a security only, and that it had been *verbally* agreed to execute a defeasance at some future time, but it did not appear that any *acts* of the grantees were inconsistent with the supposition that the conveyance was intended to be absolute, and not by way of security, parol evidence of the alleged agreement was held inadmissible.

Howland v. Stewart, 61.

LeTarge v. DeTuyll, ante vol. 1, page 227, remarked upon.—*Ib.*

[See also Vol. III. page 1.]

2. The assignee of a mortgage security, who takes without the intervention of the mortgagor, is bound by the state of the account between the mortgagor and mortgagee; and to a bill filed by the

assignee of the mortgage, for the foreclosure of the mortgage security, the mortgagee is not a necessary party, even when the mortgagor alleges that the mortgagee had been paid in full.

Gooderham v. De Grassi, 135.

3. Where a mortgagee files a bill to foreclose, and a question arises at the hearing whether he has not received sufficient to pay off the incumbrance before the commencement of the suit, the costs will be reserved.—*Ib.*

4. Where there were three mortgages on the same property, and the third was taken without notice of the second, and was afterwards transferred to another person, who thereupon obtained a conveyance to himself of the first mortgage. *Held*, that he could not tack his third mortgage to the first; and the court refused a reference to inquire whether the assignee had or had not notice of the second when he took the conveyance of the third mortgage.

McMurry v. Burnham, 289.

5. A mortgagor conveyed his equity of redemption to a third party, and afterwards contracted to release to the mortgagee; and the latter having no notice of the prior conveyance, paid the mortgagor some part of the consideration he had contracted to give for the release: *Held*, that he was entitled to tack what he had so paid to his mortgage debt.

Gordon v. Lothian, 293.

6. Where a debtor, in order to effect a compromise with his creditors, offered a mortgage on certain property, which property he represented as belonging to another person, who desired to assist him, and the creditors accepted the offer and took the mortgage, but af-

terwards discovered that, before it was executed, the debtor had obtained a conveyance of the property to himself: *Held*, that such conveyance was, under the circumstances, subject to the mortgage.

Fraser v. Sutherland, 442.

7. In a suit by the representatives of B. against the representatives of C., parol evidence was offered, which clearly proved that A. and B. had agreed to exchange properties, B. paying A. 74*l.* 12*s.* 6*d.* for difference of value; that B. had conveyed his property to A., and after the arrangement was completed, A.'s property had been conveyed to C. by B. as a security for the 74*l.* 12*s.* 6*d.* which C. undertook to pay A. in goods: And it appeared from C.'s books that he had charged the 74*l.* 12*s.* 6*d.* to B. and credited, and afterwards satisfied the same amount to A. and had credited the rents to B., and charged him with the repairs of the premises: And letters written by C. were also in proof, which indicated the existence of some agreement respecting the property. *Held*, that the parol evidence was admissible. And it appearing that the debt had been paid, the defendants were declared trustees of the property in question, for the plaintiff.

Willard v. McNab, 601.

See also, "Injunction," 11.

"Conditional Sale."

MUNICIPAL CORPORATIONS.

A municipality has the right of prohibiting the proceeding with any road within the limits of their jurisdiction and the making or improving of which by a road company formed under the 12 Victoria, chapter 84, was commenced

before any opposition was made thereto, but without the permission of such municipality. Notice of such opposition, if duly given before the work is commenced, according to the second section of that statute, has the effect of an interim injunction to restrain the commencement of the road. But though such notice is not given in time for that purpose, the power of prohibition conferred upon the Municipal Councils is not forfeited.

The Attorney General v. The Bytown and Nepean Road Company, 626.

See also "Injunction," 4.

NOTICE.

The possession of an estate by the first, but unregistered, purchaser from a registered owner is not of itself notice to a subsequent purchaser of the title of such first purchaser.

Waters v. Shade, 457.

OPENING PUBLICATION.

1. Where on the examination of a witness on the 21st of January, a person's name was mentioned as having been resident on a lot adjoining the premises in question in the cause, and on the 28th of March, after publication had passed, the cause set down for hearing, and a subpoena to hear judgment served, the defendant moved for leave to open publication and examine as a witness the person whose name had been mentioned, and who he had sworn could give material evidence—the motion was refused, with costs.

Walters v. Shade, 218.

2. *Quære*—Whether, upon an application by the plaintiff for a stay of proceedings, to which the Court considered him not entitled, an enlargement of publication can

be ordered, when an order in that form would partially accomplish what the plaintiff desired by his motion.

Howcutt v. Rees, 437.

3. *Quære also* — Whether the court would enlarge publication so as to enable a plaintiff to be present at the *viva voce* examination of the defendant, where such examination has been postponed by an accident, of which the defendant or his solicitor was the unintentional cause, till after the plaintiff's departure from the province on pressing business, and the plaintiff swore that it was necessary for his interests that he should be present.—*Ib.*

PAROL EVIDENCE.

1. Where an absolute deed of real estate had been executed, and the grantor, by his bill, alleged that the deed so executed was intended as a security only, and that it had been *verbally* agreed to execute a defeazance at some future time, but it did not appear that any *acts* of the grantee were inconsistent with the supposition that the conveyance was intended to be absolute, and not by way of security, parol evidence of the alleged agreement was held inadmissible.

Howland v. Stewart, 61.

LeTarge v. DeTuyll, ante vol. 1, page 227, remarked upon.—*Ib.*

[See also Vol. III, page 1.]

See also "Conditional Sale."

2. Where a sheriff's sale of certain lands was about to take place, and the plaintiff, who was the owner, agreed with the defendant that the latter should buy the property at the sale for the former, pay for it, out of his (the defendant's) own funds, and give the plaintiff

two years to repay him; and it appeared that the property was then sold for about one-fifth or one-eighth of its value to the defendant, who paid for it, and the plaintiff was allowed to remain in possession for two years under the agreement, and to make valuable improvements on the property; *Held*, that in such a case parol evidence was admissible to prove the agreement.

Papineau v. Gurd, 512.

3. In those cases in which parol evidence is admissible to control the legal operation of a deed, no effect can be given to such parol evidence if it is contradictory, or its accuracy is involved in doubt.

Re Brown, 590.

4. In a suit by the representatives of B. against the representatives of C., parol evidence was offered, which clearly proved that A. and B. had agreed to exchange properties, B. paying A. 74l. 12s. 6d. for difference of value; that B. had conveyed his property to A., and after the arrangement was completed, A.'s property had been conveyed to C. by B. as a security for the 74l. 12s. 6d., which C. undertook to pay A. in goods: And it appeared from C.'s books that he had charged the 74l. 12s. 6d. to B. and credited, and afterwards satisfied the same amount to A., and had credited the rents to B., and charged him with the repairs of the premises: And letters written by C. were also in proof, which indicated the existence of some agreement respecting the property. *Held*—that the parol evidence was admissible. And it appearing that the debt had been paid, the defendants were declared trustees of the property in question, for the plaintiff.

Willard v. McNab, 601.

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PARTIES.

1. Until a deed, alleged to have been obtained by fraud, is declared void, it must be deemed a valid and subsisting instrument; therefore, where at the hearing of a foreclosure suit it appeared that after the execution of the conveyance to the mortgagee a voluntary deed had been executed by him, purporting to vest all his property in trustees; that he alleged and had gone into evidence to shew this deed void, as obtained from him fraudulently; that some of the *cestius que trust* had released their interest under the deed, and that the others had not any part in obtaining the deed, and had not executed it: *Held*, that such other *cestius que trust* must, notwithstanding, be made parties to the suit, and leave was given to the plaintiff to amend for that purpose.

Rogers v. Rogers, 137.

2. In proceeding against the heir-at-law of a purchaser, in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased is a necessary party to the suit; and without one a suit is defective, though an executor *de son tort* is a defendant, and though no administration had been taken out before the filing of the bill.

Deal v. McMahon, 145.

3. To a bill of foreclosure brought by the trustees to whom the mortgage had been executed for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties.

Fraser v. Sutherland, 44.

4. To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party.

Torrance v. Winterbottom, 487.

5. To a suit brought by or against a trustee of an insolvent's estate, in respect of a sum owing by one of the debtors of the insolvent, the creditors for whose benefit the trust-deed was executed are not necessary parties.

O'Connell v. Charles, 489.

6. Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective description the conveyance to A. comprised B.'s land and did not comprise A.'s own, nor did the conveyance to B. comprise A.'s land, but each took and kept possession of the land actually intended for him: *Held*—(*Spragge, V. G. dissentiente*)—that to a bill afterwards filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party.

Rowell v. Hayden, 557.

7. To a bill by an incumbrancer for the sale of the property, all other incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the Master's office, and the proceeds of the sale will be applied to pay off all the incumbrances according to their priorities.

White v. Beasley, 660.

See also "Partnership," 6.

PARTNERSHIP.

1. Where, by articles of partnership between M. and L., it was recited, in substance, that the parties had for some years been equally interested as partners in

trade, and all profits and losses thereby; and that all their then or after acquired property, and all profits, should be divided between them equally; and that at the settlement or dissolution of the partnership, M. should have 150% over and above one-half of all the money and property which they might possess at the time of such settlement; and it was then provided, *inter alia*, that all profits and losses should be borne equally, "except, as has already been done, that M. should receive 150% more than L." *Held*, that the 150% should be deducted from the gross amount of property and money, and not from L.'s share merely.

O'Lone v. O'Lone, 125.

2. Where the defendant was, at the dissolution of a partnership, to receive 150% more than the plaintiff, and it appeared that a settlement of the accounts had been delayed by the misconduct of the defendant: *Held*, that he was not entitled to interest on the 150% from the time of the dissolution.—*Ib.*

3. Under a decree for taking partnership accounts, in which the Master was directed to state special circumstances and make all just allowances, the Master reported that in taking the accounts he had, amongst other things, charged one of the partners for his board, &c., with the other, after the dissolution of the partnership: *Held* wrong, and that the objection could be taken on the hearing on further directions.—*Ib.*

4. Where one of two partners denied the existence of a partnership, and a bill was in consequence filed against him, and by the evidence taken in the cause the partnership was established, the Court gave the plaintiffs the costs up to

the hearing, also the costs of a consent reference as to the fact of partnership, and beyond that refused costs to either party.—*Ib.*

5. Where a plaintiff filed a bill alleging that he and the defendants had agreed to be partners in certain government contracts, and it appeared that the defendants had repudiated the partnership as soon as the contracts were entered into; that the contracts were to be completed in a year, and that the bill was not filed for about eighteen months after the repudiation—the Court offered the plaintiff a reference to the Master to enquire the cause of the delay, or that his bill should be dismissed without costs.

Haggart v. Allan, 407.

6. Three partners having taken a conveyance of real estate, "as, and for partnership property, for the purposes of the partnership," and one of the partners having left the province, and another died, a mortgagee of the property filed a bill for the foreclosure of his mortgage. *Held*, that the personal representative of the deceased partner was a necessary party, and that the plaintiff must prove the absence from the jurisdiction of the non-resident partner, and perhaps the plaintiff's inability to serve him with process.

Baxter v. Turnbull, 521.

7. *Quere*—The effect of a sheriff's sale to a subsequent incumbrancer, of an equity of redemption in real estate of a partnership, where the execution was issued against all the partners; but one of the defendants had died after judgment and before execution, the judgment not having been revived, and such sale having taken place, pending a suit by the first mortgagee for the foreclosure of the mortgage.—*Ib.*

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PLEADING.

1. A demurrer to part of a bill, unaccompanied by an answer to the rest, is informal, and would be overruled.

Martin v. Kennedy, 80.

2. A demurrer to a supplemental bill, "except so much of it as is authorised by and order of the Court, set forth in it, is informal, and would be overruled for not defining with sufficient certainty the parts of the bill to which the demurrer refers.—*Ib.*

3. Where a cause having come on to be heard on the pleadings and evidence, stood over to add a party, and the plaintiff filed a supplemental bill supplying this defect, and setting forth additional matter, and a new ground for relief, the same being alleged to have come to the plaintiff's knowledge after the hearing, a demurrer, on the ground that the supplemental bill, so far as it contained such new matter, had been filed without leave of the Court, was overruled.—*Ib.*

4. An original bill having been filed, seeking relief against a patent, as having been issued in ignorance of the plaintiff's rights, and at a subsequent stage of the cause a supplemental bill having been filed, setting forth matter of which the plaintiff was ignorant when he filed the original bill, and on which he impeached the patent itself as void—a demurrer to such supplemental bill was overruled.—*Ib.*

5. Where the plaintiff by his bill sought to compel the specific performance of a contract, which, from the statements of the bill, it was plain had been created by parol, and that the plaintiff relied on acts of part performance to take the case out of the Statute of

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Grauds: *Held*, that it was not necessary that the defendant should do more than claim the benefit of the statute, without alleging that there had not been a note in writing.

Townley v. Charles, 313.

6. The plaintiff had bought from the defendant 47 acres of land, paid for it and taken a conveyance of it, but subsequently discovered that 44 acres of it were covered with water; whereupon he filed a bill charging the defendant with fraud. No evidence of any fraud having been given, and it rather appearing that both parties had acted in ignorance of the nature of the property, the bill was dismissed, with costs, but without prejudice to any new bill being filed.

Clark v. Burnham, 644.

PRACTICE.

1. Where one of the defendants was a corporation, for whom the plaintiff had entered an appearance under the 75th of Vice-Chancellor Jameson's orders: *Held*, no objection to a motion for an order to examine witnesses against the other defendants.

Rees v. Beckett, 134.

2. Where a bill is amended by adding parties plaintiff, the depositions of witnesses who had been previously examined in the cause may be read at the hearing.

Chisholm v. Sheldon, 178.

3. Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause, under the deed so produced, the party calling for its production is not bound to prove its execution.—*Ib.*

4. Where a decree of foreclosure against an infant defendant

did not reserve a day after his attaining twenty-one to shew cause, and upon his attaining his majority the infant applied upon affidavits to put in a new answer and raise a fresh defence: *Held per Cur.*, (Blake, C., *absente*), that the relief asked could not be obtained without a re-hearing of the cause, and the motion was therefore refused, with costs.

Mair v. Kerr, 223.

5. Upon the re-hearing of a cause, where the decree of foreclosure did not reserve a day to the infant: *Held per Cur.* (Blake, C., *dissentiente*), that in decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one must be reserved to the defendants.—*Ib.*

[Affirmed on appeal, 26th February 1852.]

6. Where, under such a decree, an application is made to put in a new answer for the purpose of raising a defence different from that set up by the guardian of the infant, the application must be founded on affidavits shewing that the new defence is a proper one to be permitted to be raised;—where, therefore, the ground of the application was, that the mortgagor was a mere trustee for others, and the affidavit in support of the motion did not state that the plaintiff had notice of such alleged trust,—the motion was refused, with costs. (*Esten, V.C., diss.*)—*Ib.*

7. A party to the suit having received notice of being examined by the opposite party, is not entitled to call for the production of papers in the possession of his adversary, in order the better to enable him to give his testimony.

Howcutt v. Rees, 268.

8. A party to the suit admitting the possession of documents relating to the matter in question in the cause, the opposite party is *prima facie* entitled to their production, and the party in whose custody they are must assign some ground for exempting them from the general rule.—*Ib.*

9. The defendant having obtained an order of course for the production of documents in the plaintiff's possession relating to the matters in question in the cause, the plaintiff, without producing any, lodged an affidavit stating that he had no such documents except the title deeds of the property in question in the suit, and certain letters addressed by the defendant to one K., who had purchased the property from the defendant, and who afterwards sold the same property to the plaintiff; that the suit was for the specific performance of a parol agreement partly performed and not admitted by the defendant; and that the letters did not relate to the matter in question otherwise than by affording evidence of the agreement and its part performance,—the affidavit filed in support of the motion merely said that the defendant was desirous of inspecting the letters in order to correct his intended testimony: *Held*, that he was not entitled to their production.—*Ib.*

10. A bill was filed charging the defendant with having purchased certain lands as the agent of the plaintiff and with his money, and praying to have the defendant declared a trustee of the land for the plaintiff. The evidence on the point of agency or no agency being contradictory, issues were directed to be tried as to the agency, and as to payment of the amount of

purchase money having been made out of moneys belonging to the plaintiff, or having been charged against him in account by the defendant.

Macauley v. Proctor, 390.

11. Where the decree in a cause directs sums of money to be paid reciprocally by the parties, but is silent as to setting off one sum against the other, that object cannot afterwards be attained upon motion; to do so, the cause must be re-heard.

Robinson v. Meyers, 431.

12. Where an executor, who had renounced probate of the will, is made defendant to a suit, the bill can only be dismissed as against him with costs.

Stinson v. Stinson, 508.

13. The statute 14 & 15 Victoria, chapter 66, does not authorize parties being received as witnesses on their own behalf.

Fuller v. Richmond, 509.

[But see Brennan v. Prentiss, Q. B. Mich. Term, 1851.]

14. The mere fact of the plaintiff, during the *viva voce* examination of a defendant, producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit.

Howcutt v. Rees, 553.

15. Where after the appointment of a receiver, or the issuing of a sequestration, a question with persons not parties to the suit arises on an interlocutory application as to the right to property claimed by the receiver or sequestrators, the court may either dispose of the matter at once upon the affidavits filed, or, if the matter is not ripe for decision, the court directs such proceedings to be had as appear on the whole best fitted for the

determination of the question of right.

Prentiss v. Brennan, 582.

16. An order referring it to the Master to inquire whether a claimant has any, and what right to property sequestrate, is an order which it is quite competent for the Court, if it chooses, to make.—*Id.*

17. But where an order was drawn up in that form without reference to the Court, the Court on the application of the claimant, directed the order to be modified by adding a direction that the claimant should be examined before the Master.—*Id.*

18. Where a mortgagee had become bankrupt, and he, together with his assignees, had filed a bill to foreclose the mortgage, a final order of foreclosure was granted, although one of the assignees, on account of his absence from the country, had not executed the power of attorney to receive the mortgage money, or made affidavit of non-payment.

Lyman v. Kirkpatrick, 625.

19. Where an absolute decree was pronounced under the 37th Order of May 1850, and the plaintiff, through inadvertence, served the defendant with an office copy of the bill and a notice in the terms of the 40th of those orders, the defendant applied to answer the bill and set aside the decree; and it appeared by the affidavits filed in support of the application that the intended defence was a hard one and *strictissimi juris*: the Court refused the application.

Dixon v. Mills, 647.

20. A visit of two month's duration in Upper Canada is such a residence as brings the defendant within the provisions of the Absent

Defendants' Act (14 & 15 Victoria, ch. 10).

Doremus v. Kennedy, 657.

21. Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit was afterwards committed to the Provincial Penitentiary, refused to be examined in this cause, the Court ordered the witness's evidence given at Nisi Prius to be read from the judge's notes who had tried the action at law.

Switzer v. Boulton, 603.

PRINCIPAL AND AGENT.

A person resident abroad sent funds to an agent in this country for the purpose of investing in lands; the agent bought a parcel of land for 600*l.* and took the conveyance in his own name, which properly the agent asserted to his principal he had paid 1,000*l.* for, and made a conveyance to his principal and charged him that sum in account; some years afterwards the principal discovered the true nature of the transaction, and filed a bill in this court for relief. The Court decreed him entitled to the land at the sum of 600*l.*, and directed a reference to the Master to take an account of the dealings between the principal and agent.

Arthurton v. Dalley, 1.

PRIVILEGED COMMUNICATIONS.

1. Where a defendant in a cause expressed to her attorney her desire that a certain course should be adopted in reference to a writ in the hands of a sheriff, which course in consequence thereof was accordingly pursued: *Held*, that this was not a privileged communication.

Walter v. Bernard, 344.

2. The communications from a debtor to his solicitor in reference to a compromise, which the debtor desired his solicitor to effect with his creditors, and on which communications the solicitor acted and at length effected the compromise, are not privileged, and the solicitor's evidence of them is admissible.

Fraser v. Sutherland, 442.

PRO CONFESSO.

1. Where one of several defendants make default in answering, and the plaintiff has obtained an order to set down the bill to be taken *pro confesso* as against that defendant the cause must be heard against all the defendants at the same time.

Fuller v. Richmond, 24.

2. Where a defendant has entered an appearance, and afterwards makes default in answering, and the plaintiff desires to take the bill *pro confesso*, he must serve notice of the motion for that purpose on the defendant's solicitor.

Anderson v. Henderson, 134.

PRODUCTION

(OF DOCUMENTS).

The mere fact of the plaintiff, during the *viva voce* examination of a defendant, producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit.

Howcutt v. Rees, 553.

(OF PLEADING).

Where it is required to produce any of the original pleadings filed in this Court before any other court, the party desiring their production must obtain an order of this Court for that purpose.

Cottle v. Cummings, 580.

RECEIVER.

1. Where in consequence of the misconduct of a managing partner a receiver had been appointed, a motion calling on a person in possession of property of the partnership (the legal estate in which property was in such partner) to deliver up possession or attorn to the receiver, was granted, though the person in possession swore that the conveyance by which such legal estate became vested, though absolute in form, was executed by the deponent as a security only.

Prentiss v. Brennan, 18.

2. In a suit in which a receiver of partnership effects had been appointed and a sequestration issued against the defendant for contempt, the Court retained a motion against third persons for delivery or payment to the receiver or sequestrators of a promissory note, the property of the partnership, transferred subsequently to the issuing of the injunction and sequestration, but before the note became due by the defendant, in a foreign country, the affidavits as to the *bona fides* of such transfer being contradictory, the Court giving leave to file a bill against such third persons.

Prentiss v. Brennan,

Re Bunker, 322.

3. Where an order is made upon a receiver for payment of a sum of money, the Court, on default, will commit for a contempt of such order, without requiring any further order to be served.

McIntosh v. Elliott, 396.

See also "Executor," 2.

REGISTRATION.

The prior registration of a sheriff's deed gives the sheriff's deed priority over an antecedent but unregistered deed, just as the

prior registration of a deed from the party himself would do.

Waters v. Shade, 457.

RE-HEARING.

After a cause had been heard and re-heard before *V. C. Jameson*, and again re-heard before this Court, a third re-hearing was ordered under the peculiar circumstances.

Cook v. Walsh, 625.

RESIDENCE.

A visit of two months' duration to Upper Canada is such a residence as brings a defendant within the statute (14 & 15 Vic. ch. 10) respecting absent defendants.

Doremus v. Kennedy, 657.

REVIVOR.

Where any of the parties to a suit die, and it is necessary to bring the representatives of such deceased parties before the Court, an order to amend the bill for that purpose will be granted.

Smith v. Meredith, 691.

ROAD COMPANIES.

The consent of the Governor in Council is not necessary to justify a road company formed under the statute 12 Victoria, chapter 84, in taking possession of a public highway, the property of the Crown, for the purpose of making a road over it.

The Attorney-General v. The Bytown and Nepean Road Company, 626.

SALES (OF LANDS).

1. In suits by judgment-creditors for the sale of the debtor's property, the debtor is entitled like a mortgagor to six months to redeem before the sale takes place. The rule prescribed by the statute 43 Geo. III. chapter 1, is not applicable to the practice of this Court.

White v. Beasley, 660.

2. A sale of real estate had taken place in pursuance of the decree made in a creditor's suit. It appeared that the legal estate remained in the debtor's vendors, to whom there was still owing a part of the purchase money agreed to be paid by their vendee. The Court, upon motion of the parties beneficially interested, ordered the vendors, upon payment of the amount due to them, to convey to the purchaser under the decree.

Heal v. Harper, 695.

SHERIFF (SALES BY).

See "Equity of Redemption."

SHIPS (REGISTRY OF);

This Court cannot relieve against the omission of a mortgagee of a registered vessel, to have the proper endorsement of such mortgage made on the certificate of ownership.

Coleman v. Sherwood, 652.

SEQUESTRATION.

Where a receiver of partnership property has been appointed, and certain chattels had been seized under a sequestration against the defendant for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein—the plaintiff having moved to sell this property, a reference was directed on such motion (on which the claimants had appeared) to enquire as to their interest, and any further order on the motion was reserved; the parties to the motion electing to have a reference instead of issues to try the questions in dispute.

Prentiss v. Brennan,

Re Brennan, 274.

See also "Receiver." 2.

SPECIFIC PERFORMANCE.

SETTING DOWN CAUSE.

1. Where a plaintiff filed a replication to the defendant's answer, and afterwards, and without serving a rule to produce witnesses, set the cause down for hearing, and declined to treat it as set down on bill and answer—the Court (*Esten, V. C., dissentiente*) ordered the cause to be struck out of the paper for irregularity; but inasmuch as the defendant had not taken any step to correct the irregularity before the hearing, without costs.

Killaly v. Graham, 281.

2. In future, when any objection exists to the setting down of a cause, or to the subpoena to hear judgment, the opposite party will be held, at the hearing, to have waived it, unless it be shewn that the objection could not, with reasonable diligence, have been taken before the hearing.—*Id.*

SPECIFIC PERFORMANCE.

1. Where a party agreed to sell a lot of land, and at the time of entering into the contract an instalment of one-fifth of the purchase money was paid down, the balance being payable in four annual instalments, and the vendee was let into possession and continued in the occupation of the land, but without making any further payment on account of the purchase, notwithstanding frequent applications were made to him on behalf of the vendor for that purpose: at the expiration of about three years from the time of entering into such contract, the vendor re-sold and conveyed the land to another party, who had notice, and the purchaser afterwards commenced an action of ejectment against the first vendee, who thereupon filed a bill for specific per-

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SPECIFIC PERFORMANCE.

formance of the contract, against the vendor and such second purchaser: *Held*, that the delay which had occurred was not, under the circumstances, sufficient to disentitle the plaintiff to the relief sought.

O'Keefe v. Taylor, 95.

2. *Semble*, that the peculiar condition of real property in this province, and the peculiar practice which has grown up in relation to sales, may require a modification of English cases as to the doctrine of laches.—*Ib.*

3. *Semble*, that when one party to a contract (in which time is not of the essence) desires to put an end to the contract, in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end.—*Ib.*

4. A party contracted to sell a piece of land, whereupon the purchaser was let into possession and the vendor executed a bond, intended to be conditioned for the conveyance of the land so contracted for; but, by mistake, the number of the lot was omitted, and the bond was otherwise defective. On a bill being afterwards filed by the vendor against the heir-at-law of the purchaser, the court considered that the plaintiff was entitled to rely upon the parol agreement partly performed, and that the bond which had been executed might be used by him to aid in proving the terms of the contract in pursuance of which the purchaser had taken possession.

O'Neil v. McMahon, 145.

5. Where under the terms of the contract the purchaser is let into possession of the premises

SPECIFIC PERFORMANCE. 719

agreed to be conveyed; but in consequence of default in completing the purchase the vendor institutes proceedings at law, under which the purchaser is ejected from the property; the vendor cannot afterwards call for a specific performance of the contract, but he has a right to come into this court, in order that either the contract may be specifically performed, or the purchaser's rights so bound as to enable the vendor to dispose of the property.—*Ib.*

6. In proceeding against the heir-at-law of a purchaser, in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased is a necessary party to the suit; and without one a suit is defective, though an executor *de son tort* is a defendant, and though no administration had been taken out before the filing of the bill.—*Ib.*

7. Where a purchaser executed a bond for payment of purchase money of land which he had contracted to purchase, and was thereupon let into possession in pursuance of the contract; the purchaser having afterwards made default in payment, and having refused to accept the title produced by the vendor, an action at law was commenced upon the bond; whereupon the purchaser filed his bill in equity, praying for the specific performance of the contract, if a good title could be shown; or, in the event of the vendor being unable to show a good title, then for an injunction restraining the action; and that the bond might be delivered up to be cancelled; upon a reference the vendor failed to show a good title, and the Court decreed the other branch of the prayer, but (the court being divided

in opinion on the question of costs) without costs.

Morin v. Wilkinson, 157.

8. *Seemle*, that from the peculiar mode of dealing with landed estates in this country, the Court would not introduce the strict English rule with respect to waiver of title by acceptance of possession.—*Ib.*

9. Where a contract for the sale of lands is entered into, but the purchaser is not let into possession, what delay, on the part of the purchaser, in taking steps to enforce his contract, will disentitle him to a decree for a specific performance, considered.

Hook v. McQueen, 490.

10. Where a contract was for the sale of a lot of land, "and as much of lot seventeen as should require to be flooded for the purpose of working a mill on lot sixteen" [the lot contracted for] : *Held*, that as the quantity of land on lot seventeen was capable of being ascertained by the verdict, of a jury, or an enquiry before the Master, there was not such an uncertainty in the terms of the contract as to render it void.—*Ib.*

11. The steps which the vendee of an estate, who desires the specific performance of the contract of sale, should take before filing a bill for that purpose, in order to entitle him to the costs of the suit, considered.

Hutchinson v. Rapelje, 533.

12. Where before the expiration of the time appointed by a contract for the payment of the purchase money of a lot of land, the vendee became dissatisfied with the title of his vendor, as it appeared on the books of the registry office of the county, and without any communication with the vendor filed

a bill to rescind the contract, or to have it specifically performed if it should appear that the vendor could make a good title, and at the hearing the plaintiff (the vendee) expressed his willingness to accept the title—the Court, with the consent of the defendant, offered the plaintiff a decree for specific performance on payment of costs, or if that refused, ordered that the bill should be dismissed with costs.

Currah v. Rapelje, 542.

See also "Pleading," 5.

"Waiver of Title."

SUBSTITUTIONAL SERVICE.

1. Where after the issuing of an injunction and sequestration in a partnership suit, against the defendant, a transfer was made of a promissory note, part of the assets of the partnership; and the plaintiff having filed affidavits impugning the *bona fides* of the transfer—the Court gave leave to the plaintiff to serve a notice of motion to compel the delivery or payment of the note to the receiver or sequestrators in the cause, upon the party to whom the note had been transferred, out of the jurisdiction; and such party having appeared upon and opposed the motion, substitutional service of the subpoena to answer was ordered to be made on his solicitor or agent, in a suit afterwards brought against him, by leave of the Court, for the same purpose.

Prentiss v. Brennan,

Re Bunker, 322.

2. Under the provincial statute, 14 & 15 Victoria, chapter 10, the rule respecting substitutional service is enlarged to this extent that substitutional service is now authorized upon any agent or person in charge of any property

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Canniffe v. Taylor, 617.

SUBPCENA.

Service of—out of the jurisdiction.

1. Where the plaintiff in a bill of discovery was out of the jurisdiction of the court, and the defendant, having answered, had obtained the usual order for payment of his costs, but with which order the plaintiff neglected to comply; in consequence of which the defendant was obliged to take out a subpoena and apply to the Court for leave to serve the plaintiff therewith out of the jurisdiction; the Court gave the defendant leave to serve the plaintiff out of the jurisdiction, and directed the plaintiff to pay the costs of the motion.

Peel v. Kingsmill. 272.

2. Where between the time of obtaining an order permitting service out of the jurisdiction and the service of the subpoena, the name of a town (before the mayor of which the affidavit of service was directed to be made) had been changed, a certificate of the town clerk, sealed with the corporate seal of the town under its new name, was received as proof of the fact of such change having taken place.

Rolph v. Cahoon, 623.

TACKING.

See "Mortgage," 4, 5.

TENANTS IN COMMON.

See "Injunction," 13.

TITLE.

Shewing a good—and waiver of.

1. Where a purchaser executed a bond for payment of purchase money of land which he had contracted to purchase, and was thereupon let into possession in pursu-

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ance of the contract, the purchaser having afterwards made default in payment, and having refused to accept the title produced by the vendor, an action at law was commenced upon the bond; whereupon the purchaser filed his bill in equity, praying for the specific performance of the contract, if a good title could be shewn; or, in the event of the vendor being unable to shew a good title, then for an injunction restraining the action; and that the bond might be delivered up to be cancelled. Upon a reference, the vendor failed to show a good title, and the Court decreed the other branch of the prayer, but (the Court being divided in opinion on the question of costs) without costs.

Morin v. Wilkinson, 157.

2. *Seemle*—That from the peculiar mode of dealing with landed estates in this country, the Court would not introduce the strict English rule with respect to waiver of title by acceptance of possession.—*Ib.*

2. Where a party went into possession under a contract for the purchase of a lot of forest land, in order to clear and cultivate it, and thereby raise the purchase money which was to be paid by instalments, on a bill filed by the purchaser, for a specific performance of the contract: *Held*, that he had not, by going into possession, waived his right to a reference as to title; and that he was bound to pay his purchase money into Court, pending the inquiry before the Master.

O'Keefe v. Taylor, 305.

TRUSTEES.

1. Where trustees filed a bill for the purpose of having the trusts of the deed appointing them carried

into execution, without suggesting the existence of any difficulty in the way of their winding up the affairs of the estate—the Court refused them their costs of the suit.

Cummings v. McFarlane, 151.

2. Where a trustee set up an improper claim to the property, the subject of the trust, and a bill was filed to compel him to deliver up possession and account—the Court charged him with the costs of suit up to the hearing, reserving the consideration of interest and subsequent costs

Fisher v. Wilson, 260.

3. When a trustee is required by his *cestui que trust* to convey to the latter the trust lands, in a case in which such a conveyance would be proper, it is the duty of the *cestui que trust* to solve all reasonable doubts suggested by the trustee as to the course he is desired to pursue; and the *cestui que trust* must also pay all costs, charges and expenses properly incurred in relation to the trust, otherwise a decree for the conveyance will only be made on payment of the costs of the suit to the trustee.

Rowsell v. Hayden, 557.

UNDUE INFLUENCE.

Where a party being in gaol on a charge of felony, was liberated upon the present defendant becoming bail for his appearance, and having in the interval between his liberation and trial executed a deed of his property to the defendant for an inadequate consideration, afterwards filed a bill to set this conveyance aside on account of fraud, alleging that he had executed it under the impression, and upon the assurance of the defendant, that the deed was merely a recognizance for his due appear-

ance to take his trial: this allegation being disproved, the Court dismissed the bill but without costs; and gave the plaintiff leave to file another, if he should be so advised, to set aside the conveyance on the ground of inadequacy of consideration and undue influence. Vallier v. Lee, 606.

VALUABLE CONSIDERATION.

A mortgage to creditors, to secure their debts, is a sufficient valuable consideration to give a prior registered conveyance precedence over a conveyance previously executed, but registered subsequently.

Fraser v. Sutherland, 442.

VOLUNTARY CONVEYANCE.

Where there are two voluntary settlements, the Court will, at the suit of those interested under the first, set aside the subsequently executed settlement; and it is no objection to relief in such a case that courts of law would give effect to the first against the second.

Houlding v. Poole, 685.

See also "Crown Lands."

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See "Injunction," 12.

WITNESS.

Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit was afterwards committed to the Provincial Penitentiary, and refused to be examined in this cause—the Court ordered the witness's evidence given at Nisi Prius to be read from the Judge's notes who had tried the action at law.

Switzer v. Boulton, 693.

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